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June 18, 2009

VIA HAND DELIVERY AND E-MAIL

The Honorable Fred E. Weiderhold, Jr.
Inspector General
National Railroad Passenger Corporation
10 G Street, N.E., Suite 3E-400
Washington, DC 20002

Re: Report on Matters Impairing the Effectiveness and Independence of the Office of Inspector General of the National Railroad Passenger Corporation (Amtrak)

Dear Inspector General Weiderhold:

On February 11, 2009, you retained Willkie Farr & Gallagher LLP ("Willkie Farr") to, among other things, review and analyze several Amtrak policies and practices relating to oversight of OIG audits, investigations, and operations. Specifically, you requested Willkie Farr to examine (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations, (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters, and (3) Amtrak's internal procedures governing OIG funding under the American Recovery and Reinvestment Act of 2009 ("ARRA"), for potential impairments to the OIG's statutory independence under the Inspector General Act. Transmitted herewith is my report on these matters.

I am available to discuss these matters further at your convenience.

Sincerely yours,

Robert J. Meyer

cc: Colin C. Carriere, Esq., Deputy Inspector General Investigations and Legal Counsel
D. Hamilton Peterson Esq., Deputy Counsel/Director Special Investigations
Joseph E. diGenova, Esq., diGenova & Toensing, LLP

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Report on Matters Impairing the Effectiveness and Independence of the Office of Inspector General of the National Railroad Passenger Corporation (Amtrak)

Robert J. Meyer
Willkie Farr & Gallagher LLP

June 18, 2009

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I. INTRODUCTION

On February 11, 2009, the Office of Inspector General ("OIG") of the National Railroad Passenger Corporation ("Amtrak" and, together, "Amtrak OIG") retained Willkie Farr & Gallagher LLP ("Willkie Farr") to review and analyze several Amtrak policies and practices relating to oversight of OIG audits, investigations, and operations. Specifically, the Amtrak OIG requested Willkie Farr to examine (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations, (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters, and (3) Amtrak's internal procedures governing OIG funding under the American Recovery and Reinvestment Act of 2009 ("ARRA"), for potential impairments to the OIG's statutory independence under the Inspector General Act.[1] Prior to engaging Willkie Farr, the Inspector General had suggested that the policies and practices in question were "inconsonant with the Inspector General [Act] and the standards of the IG community" and resulted in "serious and unreasonable interference with OIG activities." The OIG thereafter requested that Willkie Farr examine these issues and make recommendations for how to address them within Amtrak or otherwise.

As described in more detail below, we have concluded that the Amtrak OIG's independence and effectiveness are being substantially impaired by a number of policies and practices at the corporation relating to Law Department oversight of OIG investigations, OIG personnel matters, and OIG funding. For example:

- The Law Department at Amtrak pre-screens all Amtrak documents before production to the OIG, in some cases redacting information from documents to be produced to the OIG and making determinations regarding what is responsive to the OIG's requests.

- Law Department personnel or outside counsel retained by the Law Department attend OIG interviews of Amtrak personnel and in some cases third parties, including OIG interviews of employees of Amtrak vendors and contractors.

- Amtrak policy prohibits the OIG from disclosing "Amtrak information" to Congress and any other "third party," unless the information is first reviewed by the Law Department to enable the Law Department to take appropriate action "to restrict or limit disclosure of such information."

- The OIG's personnel decisions are subject to Law Department oversight, with respect to which the General Counsel has asserted that she is the ultimate

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[1] The Inspector General Act of 1978, 5 U.S.C. app. 3.

authority within Amtrak regarding interpretation of the Inspector General Act and the OIG's personnel authority.

- And, OIG funding under the ARRA is subject to review by the Law Department and approval by several other senior members of Amtrak management, including the Chief Financial Officer and Chief Operating Officer.

These policies and practices constitute significant impairments to the Amtrak OIG's effectiveness and its actual and perceived independence under the standards of the Inspector General Act, 5 U.S.C. app. 3 ("IG Act"), as well as published guidance of the Office of Management and Budget ("OMB") and the Government Accountability Office ("GAO"). In enacting the IG Act, Congress intentionally gave Inspectors General ("IGs") an extraordinary degree of authority, discretion, and independence in carrying out their duties and responsibilities. This included, among others, the power to initiate and carry out audits, investigations, and inspections "as necessary" within each IG's judgment; direct access to documents and information within their agencies, departments, and entities; a direct reporting relationship with Congress; and independent authority over OIG personnel and resources. Published guidance by OMB and the GAO reflects these same standards of independence.

In the report that follows we summarize these standards and how Amtrak's current policies and practices are impairing the OIG's independence and effectiveness. We also make several recommendations for addressing these matters. In sum, we advise that the OIG address these issues and this report's recommendations with Amtrak's Chairman. Further, in light of our conclusion that the OIG's ability to carry out its statutory functions has been compromised, and in keeping with the OIG's obligation to keep the Congress "fully and currently informed," we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

We are available at your convenience to discuss these matters further.

II. EXECUTIVE SUMMARY

The Amtrak OIG is one of many OIGs created by Act of Congress to promote integrity and efficiency at departments and agencies of the federal government, as well as at certain other designated federal entities ("DFEs") such as Amtrak. Since 1978, Congress has consistently looked to OIGs for unbiased assessments of the management of federal funds and programs. As one congressional advocate of OIGs recently stated:

> Over the years, I have seen a number of Inspectors General come and go. It is a tough job to be an Inspector General. You can not go along to get along. You must buck the system, dig deep into the books of the agency, find where the secrets are hidden, and then report the truth to Congress, the President, and the American people. Unfortunately, Inspectors General must do all this with the agencies that often fight their every move. These entrenched bureaucracies have an interest in not seeing Inspectors General succeed—they do not want egg on their face. That is why we in

> Congress must make sure they have all the tools they need to get the job done and ensure that there is accountability for the billions in taxpayer dollars that are spent annually on the operation of the Executive Branch.[2]

The critical function played by the federal government's OIGs is illustrated by statistics for fiscal year 2007 (the most recent year for which data is available) showing that the combined efforts of the U.S. government's IGs that year resulted in $11.4 billion in potential savings from audit recommendations, $5.1 billion in investigative recoveries and receivables, 8,900 successful prosecutions, and 4,300 suspensions or debarments.

Amtrak's OIG was established in 1989 and is tasked by federal statute with preventing and detecting fraud and abuse in Amtrak programs and operations, conducting and supervising audits and investigations, and recommending policies to promote economy, efficiency, and effectiveness within Amtrak's operations. Although Amtrak is not a federal agency, it is a recipient of significant federal funding, and Congress accordingly created the Amtrak OIG to act as a watchdog over Amtrak's integrity and effectiveness just as the other statutory IGs watch over the U.S. government's departments and agencies. In creating Amtrak's OIG, Congress gave it the same mission, functions, and independence as the U.S. government's other statutory OIGs.

The successful accomplishment of an OIG's mission requires objectivity and independence. An OIG's audits, investigations, and policy recommendations must be impartial and must be seen as impartial by the OIG's two critical audiences—its own agency or DFE head, and Congress. Both the entity and Congress must be able to rely on an OIG's unbiased work as a basis for improving the stewardship of taxpayers' money and for making important legislative and other policy decisions. As the GAO has observed, "the concepts of objectivity and independence are very closely related."[3] Indeed, it is axiomatic that "[p]roblems with independence or conflicts of interest may impair objectivity."[4] Thus, to objectively perform its mission, an OIG must have direct access to its entity's information and be free of supervision from and entanglements with the management and operations of the entity that it oversees. Having an OIG that is dependent upon, reports to, or is otherwise under the supervision of, the officials whose programs it is auditing and investigating would be, as Congress noted in 1978, "an exercise in futility."[5]

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[2] 155 Cong. Rec. S5132 (daily ed. May 8, 2009) (statement of Sen. Grassley).

[3] GAO Report, *Gov't Auditing Standards*, GAO-07-731G, at 27 n.19 (July 2007).

[4] *Id.*

[5] S. Rep. No. 95-1071, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2681.

For these reasons, Congress has repeatedly recognized that the successful accomplishment of an OIG's mission requires independence within an agency or DFE. On its most basic level, an OIG's mission entails investigating and reporting on waste, fraud, and abuse in federal programs. On a broader public policy level, however, an OIG plays "a critical role in maintaining checks and balances in the federal government."[6] On either level, an OIG's independence is critical to the successful performance of its mission and the perception of its objectivity.

In the case of a DFE, such as Amtrak, this means, among other things, that the head of the entity (in Amtrak's case, the Chairman of the Board of Directors) may only exercise general supervision over the Inspector General's Office. The OIG may not report to or otherwise be supervised by any other entity officer or employee. Independence also requires that the Office of Inspector General have unfettered access to entity documents and information, without the involvement, oversight, or supervision of other officers or personnel within the entity. Finally, independence requires that the OIG have functional budgetary and personnel independence. Absent independence in expending funds and in hiring and promoting personnel, an OIG would lack meaningful independence from the management it was expected to oversee. As discussed in more detail in this report, each of these attributes of independence is firmly grounded in the Inspector General Act, as amended, and guidance from OMB and the GAO.

Against this background, the Amtrak OIG has retained Willkie Farr to assess and make recommendations regarding several issues concerning the independence of the Amtrak OIG—issues related to internal reporting, access to documents, and budgetary and personnel independence. Although these issues have been discussed within Amtrak, up to and including discussions with the entity head and the Board of Directors, the issues persist in ways that the IG believes significantly impair his independence and are inconsistent with the IG Act.

Specifically, the Amtrak OIG has asked Willkie Farr to examine the following Amtrak policies and practices for potential impairments to the OIG's statutory independence: (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations; (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters; and (3) Amtrak's internal procedures governing ARRA funding. The Amtrak OIG has further requested, insofar as we conclude that these policies or practices are inconsistent with the standards of the IG Act or OMB or GAO guidance, that Willkie Farr make recommendations for corrective action by the Chairman of the Board of Directors to ensure any such policies and practices are consonant with the requirements of objectivity and independence under the Act.[7]

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[6] H.R. Rep. No. 110-354, at 9 (2007).

[7] In connection with this report we principally reviewed the following documents supplied by the OIG (in no particular order): (1) the October 10, 2007 Agreed Protocol of the Amtrak Office of Inspector General and Law Department Regarding Disclosure of Privileged, Classified, Proprietary or Other Confidential Information (the "Protocol") (and drafts of the Protocol); (2) correspondence between the OIG and the Law Department (and the Law

The policies and practices at issue first arose in approximately 2007, after an alleged leak of attorney-client privileged information in connection with an OIG investigation of the Law Department's use and supervision of outside counsel. Since then, the Law Department has sought to exercise increasingly significant oversight of OIG investigations, document requests, and interviews of Amtrak personnel. For example, in connection with various OIG investigations:

- In February 2007, the OIG issued a subpoena to one of Amtrak's principal outside law firms. The law firm refused to produce documents without direction from the Law Department, and the Law Department failed to instruct the law firm to comply immediately with the OIG's requests. Rather, the Law Department required the OIG to enter into a written protocol limiting the OIG's use of certain

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(continued)

Department's outside counsel) related to the Protocol; (3) correspondence between the OIG and the Board of Directors related to the Protocol; (4) the November 5, 2007 Administrative Directive ("2007 EXEC-1") (and drafts of the EXEC-1); (5) correspondence between the OIG (and its outside counsel) and the Board of Directors regarding the 2007 EXEC-1 (and draft correspondence); (6) the July 28, 2005 Amtrak policy regarding indemnification of Amtrak employees; (7) draft memoranda from the Board of Directors to all Amtrak departments and employees regarding cooperation with the OIG; (8) Review of Amtrak's Management of Outside Legal Services by the OIG and Department of Transportation Inspector General (and drafts of the review); (9) May 31, 2006 Report by John W. Toothman ("Toothman") entitled "Amtrak Law Department Performance"; (10) the Toothman retention agreement and other correspondence between the OIG and Toothman; (11) correspondence among the Law Department, OIG, and Board of Directors regarding the OIG investigation into Amtrak's use of outside counsel; (12) correspondence between the OIG and members of Congress regarding the OIG investigation into Amtrak's use of outside counsel (and draft correspondence); (13) correspondence between the OIG and attorneys for Amtrak employees from whom the OIG sought documents and interviews; (14) OIG subpoenas to Amtrak vendors; (15) correspondence between the OIG and attorneys for Amtrak vendors subpoenaed by the OIG; (16) correspondence between the Law Department and attorneys for Amtrak vendors subpoenaed by the OIG; (17) correspondence between the OIG and the Law Department regarding various OIG document requests and interview requests to Law Department employees, other Amtrak employees, and Amtrak vendors; and (18) correspondence and memoranda among OIG personnel regarding pending investigations and outstanding requests for documents and information. Many of the foregoing documents are subject to applicable privileges and nothing contained herein is intended to waive any privilege or other confidentiality.

In addition to the foregoing documents provided by the OIG, we also considered, as cited throughout the report, (1) the Inspector General Act, its amendments, and the legislative history of the statute and its amendments; (2) published reports regarding inspectors general and their conduct of audits and investigations from the United States Government Accountability Office, the Project on Government Oversight, the President's Council on Integrity and Efficiency, and the Executive Council on Integrity and Efficiency; (3) law review articles and media reports on the purpose and legislative history of the Inspector General Act; and (4) media reports regarding Amtrak's use of outside counsel.

We have also reviewed an analysis of some of these issues prepared by Joseph E. diGenova of diGenova & Toensing LLP. *See* Oct. 17, 2008 Letter from Joseph E. diGenova to Donna McLean. In this letter, diGenova concluded that certain Amtrak policies hindered the function and operation of OIG and were inconsistent with the IG Act. We have not sought or received documents or information from the Board of Directors, Law Department, or any other Amtrak personnel, and we have not conducted any interviews of Amtrak directors, officers, or other personnel in connection with this report.

documents without prior Law Department review and approval. In May 2007, the law firm produced its first set of documents responsive to the subpoena. The law firm's production continued in installments through February 2008, and remains incomplete insofar as it has not yet provided a certificate of compliance.

- As part of the same investigation, in 2007 and 2008, the OIG sought documents and interviews with Law Department employees. The Law Department required that the General Counsel be notified of, and approve, all document requests by the OIG to Law Department employees. The Law Department also required that separate counsel be appointed, at Amtrak's expense, to represent all Law Department employees to be interviewed.

- In connection with an OIG investigation of Amtrak's retention of a financial adviser, in December 2008 the OIG issued a subpoena to the adviser and additionally sought documents and information from two Amtrak employees. The adviser and the employees declined to provide complete document productions to the OIG without first sending documents to the Law Department for its review. In the case of the adviser, the OIG sent a letter on February 13, 2009 to the adviser's attorneys with instructions for complying with the subpoena. The Law Department issued a letter the same day purporting to repudiate the OIG's instructions and giving different ones.

- In response to a whistleblower complaint, in December 2007 the OIG initiated an investigation of an Amtrak consultant suspected of inflating its fees. The consultant resisted making its time records database available for inspection on the grounds that doing so would purportedly breach confidences of its other clients. During negotiations between the OIG and the consultant's attorneys, the Law Department on March 31, 2008 sent a letter to the consultant's attorneys requesting that the consultant provide responsive documents first to the Law Department for review prior to production to the OIG. The consultant subsequently used the March 31, 2008 letter from the Law Department in support of its contention that it could not, for client confidentiality reasons, provide the time records database to the OIG. The consultant also noted that it would not produce documents to the OIG without Law Department permission and it requested that Amtrak's General Counsel attend any questioning of its employees.

- In January 2008, the OIG began an investigation of an Amtrak supplier suspected of delivering defective products. The OIG sought certain inspection reports and related documents from Amtrak's Engineering Department to determine who should bear the cost of replacing the defective product. The Engineering Department referred the OIG to the Law Department for the documents. On February 28, 2008, Amtrak disclosed publicly that the vendor had installed defective products and that it would cost tens of millions of dollars to remediate the issue. The OIG then made several follow-up requests to the Law Department for the requested documents. In June 2008, the Law Department made a partial production of documents responsive to the OIG's request of the Engineering

Department. Some of the requested documents were missing or redacted, while others were designated with a label that indicated they should not be shared with third parties.

Each of the foregoing examples is discussed in more detail in this report, as well as our conclusion that such Law Department oversight of OIG activities is inconsistent with the letter and spirit of the Inspector General Act and the Amtrak OIG's statutory independence. In that regard, it is important to note that even if motivated by an interest in protecting legal privilege or other interests of Amtrak, the Law Department may not interfere with the OIG's investigations so as to impair the OIG's independence or undermine the credibility of its investigations. Such interference would be inconsistent with the IG Act and the published guidance of OMB and GAO.

We have also examined other issues that potentially impair the OIG's independence at Amtrak—issues involving the Inspector General's independent personnel authority and budget oversight—and have concluded that, in those areas as well, Amtrak's policies and practices are inconsistent with the letter and spirit of the Inspector General Act and published OMB and GAO guidance:

- Regarding the OIG's independent personnel authority, we reviewed correspondence between Amtrak's General Counsel and the Deputy IG for Management and Policy in which the General Counsel objected to, among other things, the IG's decision to increase the salaries of certain OIG staff. In attempting to reject the salary increases, the General Counsel took the position that she is the ultimate legal authority within Amtrak regarding interpretations of the Inspector General Act and the OIG's personnel authority.

- We also reviewed an issue of budget oversight involving the OIG's access to ARRA funds that Congress appropriated expressly for the OIG. Amtrak received an appropriation of $1.3 billion, $5 million of which was expressly allocated to the Amtrak OIG. In March 2009, Amtrak applied for ARRA funding without input from the OIG and has since directed that OIG's use of ARRA funding would require review by the Law Department and approval by several senior members of Amtrak management, including the Chief Financial Officer and Chief Operating Officer.

In the report that follows, we examine each of the foregoing issues in more detail. In Section III, we provide a detailed discussion of the IG Act and its application to Amtrak. This section begins with a brief history of the origins of the IG function, describing how Congress determined that internal audits, standing alone, could not sufficiently protect against waste, fraud, and abuse within the federal government. The section discusses the adoption of the IG Act in 1978 and the circumstances surrounding its subsequent amendments, including, in particular, the 1988 amendments that established an IG at Amtrak, among other DFEs. In this portion of the report, we discuss the statutory duties and responsibilities of inspectors general, along with the IG Act provisions and legislative history relating to the establishment and protection of OIG independence.

In Section IV, the report describes in more detail the recent developments at Amtrak, highlighted above, implicating the perceived and actual independence of the Amtrak OIG. This section discusses the background of current Amtrak policies and practices governing the relationship between the Amtrak OIG and the Law Department in OIG investigations and audits. These include a written 2007 Protocol between the OIG and the Law Department and changes approved in 2007 to Amtrak's EXEC-1 (Amtrak's internal procedures relating to the OIG). This section includes a discussion of how the Protocol and EXEC-1 have been applied in practice at Amtrak in the context of several investigations and audits currently underway. This section also includes a discussion of other issues potentially affecting the OIG's statutory independence relating to its budgetary and personnel issues.

In Section V, the report analyzes these Amtrak procedures under the Inspector General Act and other authorities. We conclude that many of the policies and practices discussed in this report have (1) impaired the OIG's independence, (2) unlawfully restricted the OIG's access to information and documents, (3) improperly subjected the OIG to the supervision of the Law Department contrary to the statutory requirement that the OIG be subject only to the general supervision of Amtrak's Chairman, and (4) undermined the objectivity of the OIG's work product because of the appearance and reality of improper external political pressures on the OIG.

Finally, in Section VI, the report concludes with recommendations to address the concerns noted above and to improve the integrity and effectiveness of OIG activities at Amtrak. These recommendations include:

- Empowering the OIG to gather documents and information in support of its audits and investigations from Amtrak employees or vendors without any involvement of, or notification to, the Law Department or other departments, specifically amending EXEC-1 to that effect;

- Precluding the Law Department from attending OIG interviews with Amtrak employees or employees of vendors, unless at the request of the OIG;

- Entrusting the OIG's own attorneys—rather than the Law Department—to advise on the collection and use of Amtrak's potentially privileged and proprietary information during OIG investigations; and

- Permitting the OIG to utilize ARRA funds allocated by Congress, and to set compensation for its staff, without involvement of other Amtrak departments.

We further recommend that the OIG address these issues and this report's recommendations with Amtrak's Chairman. Additionally, in light of our conclusion that the OIG's ability to carry out its statutory functions has been compromised, and in keeping with the OIG's obligation to keep the Congress "fully and currently informed," we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

III. STANDARDS OF INDEPENDENCE UNDER THE INSPECTOR GENERAL ACT

A. Introduction

In the early 20th century, Congress created a basic legislative framework for financial controls and audits of government agencies by which it sought to ensure that public funds were legally expended and that the government's operations were conducted in an economical and efficient manner on behalf of the taxpaying public. It enacted the Budget and Accounting Act of 1921 and established what is now the Government Accountability Office ("GAO") (formerly the General Accounting Office) as an entity that could "independently settle the accounts of the agencies of government."[8]

By the end of World War II, Congress found that the enormous growth of the federal government had significantly outpaced GAO's capacity to audit the wide range of federal agencies and programs then in existence. Consequently, in the Accounting and Auditing Act of 1950, Congress directed each covered federal agency to establish and maintain its own accounting and related systems so that it could keep "effective control over and accountability for all funds, property, and other assets for which the agency is responsible, including appropriate internal audit."[9]

By the late 1970s, although the federal government had expanded greatly, the GAO found that some agencies had not yet complied with the 1950 Act, while others had minimally complied or maintained audit and investigative functions that were poorly staffed or so decentralized as to be ineffective.[10] Following several multi-million dollar scandals involving the fraudulent misuse of federal program funds, OIGs were established administratively in at least one cabinet department and by statute at several others. However, most of the agencies responsible for administering the bulk of federal spending did not yet have strong, organized, or centralized audit or investigative functions.

Convinced that the existing patchwork system offered little assurance that serious issues of waste and fraud would ever come to light and that piecemeal efforts by federal agencies would not work, committees in both houses of Congress held extensive hearings and conducted a number of their own investigations. These revealed that auditors and investigators throughout the federal government were "severely handicapped" by several serious conditions, including: [11]

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[8] S. Rep. No. 100-150, at 2 (1987).

[9] *Id.* (citing Pub. L. No. 784, 81st Cong.).

[10] *Id.* at 3.

[11] H.R. Rep. No. 100-1027, *The Inspector General Act of 1978: A Ten-Year Review*, at 4 (1988).

- Lack of independence—agency audit and investigative staff were supervised by the same officials responsible for the programs or funds being audited or investigated, and the staff could not initiate audits or investigations without the approval of their supervisors. In some cases, investigators had been "kept from looking into suspected irregularities, or even ordered to discontinue an ongoing investigation."[12]

- Lack of effective organization and leadership—congressional hearings confirmed GAO's findings that some agencies had several audit or investigative units "organized in fragmented fashion with no strong central leadership."[13]

- Lack of coordination between audit and investigative staffs within the same agency.

- Lack of resources, resulting in infrequent audits or none at all.

Based on these findings, Congress concluded, "[t]here is now unanimous agreement that the Federal Government has failed to make sufficient and effective efforts to prevent and detect fraud, abuse, waste, and mismanagement in our programs and expenditures."[14]

Accordingly, Congress enacted the Inspector General Act of 1978, with considerable bipartisan support in both the House and the Senate. The Act created OIGs in 12 executive departments and agencies, each to be led by an IG appointed by the President and confirmed by the Senate. The existing auditing and investigative resources of these agencies were consolidated under the leadership of the IG, whom Congress determined should act as "an individual with high visibility" in the agency as well as "the single focal point . . . for the effort to deal with waste, fraud, and abuse in agency operations and programs."[15] As one Representative noted during debate on this legislation in the House of Representatives:

> The Inspector General, responsible for investigations of fraud and abuse, is a symbol to the Congress and the public, that any department or agency desires efficiency and honesty within its ranks, and is symbolic of an agency's willingness to tighten up on fraud in any of its programs.[16]

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[12] 124 Cong. Rec. H10922 (daily ed. Sept. 27, 1978) (statement of Rep. Fountain).

[13] H.R. Rep. No. 100-1027, *supra* note 11, at 4.

[14] 124 Cong. Rec. S15870 (daily ed. Sept. 22, 1978) (statement of Sen. Eagleton).

[15] *Id.*

[16] 124 Cong. Rec. H2948 (daily ed. Apr. 18, 1978) (statement of Rep. Gilman).

Congress intended these IGs to conduct audits and investigations "without hindrance" in their agencies and gave them "broad authority to obtain information in aid of such audits and investigations, including subpoena power."[17] An IG's independence from both internal and external political pressures was regarded as "fundamental" and is protected by several key provisions of the Act, as discussed in more detail in subsection B, below.

Since 1978, the Act has been amended several times to create OIGs at additional federal agencies and DFEs (including Amtrak) and, as of 2008, there were 58 statutory OIGs in the federal government.[18] The basic OIG model embodied in the 1978 Act is regarded as highly successful and Congress has enacted only a few substantive modifications to it.[19] Such revisions have primarily been designed to further strengthen the IGs' independence, after Congress heard evidence of "[i]nterference by agency management, the absence of input or control by [IGs] into their office budgets, and campaigns by management to remove [IGs] who are aggressive in their investigations . . . ."[20]

It is clear that, after more than 30 years' experience with the IG Act, Congress still places a high value on the work of the IGs, continues to safeguard their independence, and, on a bipartisan basis, regards the IGs as "vital partners" in the effort to give Americans "better value for their tax dollar."[21]

B. The Text and Legislative History of the IG Act

The legislative history of the IG Act shows that, of all of the key attributes of an Inspector General, Congress placed the highest priority on independence. Congress also clearly understood that the degree of independence it had in mind for the IGs was exceptional. Testifying before the Senate Governmental Affairs Committee in 1978, Representative Fountain—then Chairman of the subcommittee of the House Government Operations Committee that had drafted the House version of the IG Act—reflected on the breadth of federal program fraud that for too long had gone undetected and ultimately compelled Congress to act:

> I think the facts which have been disclosed are so fantastic and the abuses and frauds are so great that we are forced to take

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[17] H.R. Rep. No. 100-1027, *supra* note 11, at 5.

[18] H.R. Rep. No. 110-354, at 9.

[19] *See generally* H.R. Rep. No. 100-1027, *supra* note 11.

[20] H.R. Rep. No. 110-354, *supra* note 18, at 9.

[21] Press Release, Sen. Comm. on Homeland Security & Governmental Affairs, Sen. Collins' Bipartisan IG Reform Bill Signed Into Law (Oct. 15, 2008) *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=9d1a6af2-ff91-48fa-8af5-988a9e05700e&Month=10&Year=2008.

> extraordinary measures to establish the kind of independence within the agency which this legislation establishes.[22]

In the hearings held by Representative Fountain's subcommittee, one congressman responded to criticism of the proposed extent of IG independence, saying:

> [M]y concern is not that [the IG] will be too independent *but [that] . . . the IG will not be independent enough* in order to really blow the whistle . . . . I think that unless you have an independent and tough-minded person who is going to get that information, knows that he is not going to be cut off at the pass, and knows it is going to get into the hands of people who can really take action [i.e., Congress], then I do not think it will work.[23]

Speaking later during the House debate, Representative Wydler observed:

> The new IGs are to be totally independent and free from political pressure. If I have any reservations at all, they are concerned with that independence. I would merely suggest that we keep an eye on these IGs and see to it that they have the freedom to operate independently.[24]

As each of the foregoing statements suggests, Congress carefully considered the necessity of incorporating into the Act a mandate of independence for the IGs, and it deliberated over a number of specific safeguards that ultimately were enacted with the hope that they would guarantee such independence to the greatest extent possible. These include appointment of the IGs by either the President of the United States or the DFE head and an administrative structure shielding the IG from supervision by anyone other than the DFE head who, even then, was given only limited authority over IG functions.

The safeguards also include: a direct reporting relationship between the IG and Congress; dedicated staff and office resources; unrestricted access to agency records; subpoena power; special protections for agency employees who cooperate with the IG; and the ability to refer criminal matters to the Department of Justice ("DOJ") without clearing such referrals through the agency's or entity's Office of General Counsel ("OGC").[25] Anticipating the

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[22] *Legislation to Establish Offices of Inspector General—H.R. 8588: Hearings before the Sen. Comm. on Govt'l Affs.*, 95th Cong. 15 (1978).

[23] *Establishment of Offices of Inspector General: Hearings before a Subcomm. of the House Comm. on Gov't Ops.*, 95th Cong. 29 (1977) (statement of Rep. Levitas) (emphasis added).

[24] 124 Cong. Rec. H2949 (daily ed. Apr. 18, 1978).

[25] *See generally* 5 U.S.C. app. 3 §§ 4-7, 8G.

possibility of personal risk to an independent OIG pursuing its mission, Congress even authorized certain IGs to "carry a firearm" and to "make an arrest without a warrant" when authorized to do so by the Attorney General.[26]

The basic safeguards initially enacted for the 12 presidentially appointed IGs created in 1978 have been extended to all of the additional IGs created since then. These safeguards were reaffirmed and expanded by Congress in October 2008, when Congress passed the Inspector General Reform Act of 2008 ("IG Reform Act"). We discuss each of these safeguards of IG independence in more detail below.

Appointment/Removal by the President or DFE Head. The 1978 Act provided for the appointment of each of the 12 new IGs by the President with the advice and consent of the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[27] The 1988 Amendments, establishing OIGs at more than 30 DFEs, including Amtrak, provided for these IGs to be appointed by the head of the DFE, which, for Amtrak, means the Chairman.[28] The relatively smaller size of the DFEs apparently led Congress to conclude that presidentially appointed IGs were not needed there.

Originally, the standards of integrity and ability for DFE IGs were implied, rather than stated. Nevertheless, the conferees made clear their intent that "the head of the designated Federal entity appoint the Inspector General without regard to political affiliation and solely on the basis of integrity and demonstrated ability . . . ."[29] The IG Reform Act made this standard explicit.[30]

Whether appointed by the President or the DFE head, IGs were not limited to a fixed term of office.[31] Although the Act allows the President or DFE head (whichever is applicable) to remove an IG from office, the reasons for such removal must be communicated in writing to Congress at least 30 days in advance. Implicit in this required communication is

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[26] *Id.* § 6(e)(1)(A), (B). These privileges, originally reserved for presidentially appointed IGs, were extended to DFE IGs, including Amtrak's IG, by section 11 of the Inspector General Reform Act of 2008.

[27] *Id.* § 3(a). The standards of integrity and ability for DFE IGs were implied, rather than stated, in the 1988 Act. Congress remedied this in section 2 of the 2008 Act by expressly adopting the same standards for DFE IGs.

[28] *Id.* § 8G(a)(3); Office of Management & Budget, 2008 & 2009 List of Designated Federal Entities and Federal Entities, 74 Fed. Reg. 3656 (Jan. 21, 2009).

[29] H. Rep. No. 100-1020, at 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3179, 3186.

[30] The Inspector General Reform Act, Pub. L. No. 110-409, § 2, 122 Stat. 4305 (2008).

[31] The 2008 Act provides for a seven-year term for IGs appointed after the date of enactment, but does not limit the number of terms an IG can serve.

Congress's intent to scrutinize and potentially investigate removals which appear to be unjustified in order to protect the IG's independence.

Supervisory and Reporting Structure. Congress also sought to safeguard an IG's independence by limiting the supervising and reporting structure to which a DFE IG is subject. Accordingly, section 8G(d) of the Act provides that a DFE's IG "shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity."[32] In addition, an IG is assured of "direct and prompt access" to the agency or DFE head "when necessary for any purpose pertaining to the performance of functions and responsibilities" under the Act.[33]

Section 8G(d) also makes clear that an agency or DFE head's *general* supervisory relationship does not encompass the *specific* authority to direct or supervise any of an IG's audit or investigative responsibilities: "The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation."[34]

Direct Reporting to Congress. In addition to assuring that an IG would be under only the general supervision of an agency or DFE head, Congress also created a direct reporting relationship between the IGs and Congress. Section 5 of the Act directs each IG to report to Congress twice a year. An IG must furnish a copy of these semiannual reports to the agency or DFE head, who has 30 days to review and comment before the report is transmitted to Congress.[35] However, the entity head has no authority to intercept, change, or reject the IG's report. Rather, at the end of the 30-day period, the report must be transmitted to Congress along with any comments the agency or DFE head deems appropriate.[36]

An IG is required to report "immediately" to the DFE head whenever the IG "becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations" and the report must be transmitted to the appropriate committees or subcommittees of Congress within seven calendar days.[37] Again, an IG's independence is maintained in this process because the agency or DFE head is not authorized to intercept, change, or reject such reports, but must transmit the report to the

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[32] 5 U.S.C. app. 3 § 8G(d).

[33] *Id.* § 6(a)(6).

[34] *Id.* § 8G(d).

[35] *Id.* § 5(b).

[36] *Id.* § 5(b)(1)

[37] *Id.* § 5(d).

appropriate congressional committees within one week. Such communications are generally referred to as "seven-day letters."

The Act neither authorizes nor prohibits other forms of communication between the IGs and Congress but, in practice, other forms of communication have developed. The legislative history of the 1988 amendments to the IG Act indicates that Congress expected *informal* channels of communication between itself and the IGs to supplement the formal reporting set forth in the IG Act.[38] By that time, additional *formal* means of communication had also developed, including correspondence between congressional committees and IGs, and testimony by IGs at congressional hearings.

In its ten-year review of the IG Act in 1988, the House Committee on Government Operations reported the following with respect to IGs:

> They also provide the Congress information both formally and informally . . . . In addition to [the] formal mechanisms, inspectors general provide testimony and copies of audit and investigative reports to the Congress at the request of specific committees, subcommittees, and Members. They also provide responses to specific inquiries from committees, subcommittees, and Members.[39]

The committee also noted with approval that "inspectors general report extensive informal contact and reporting to the Congress during day-to-day operations."[40] The committee further noted that "[t]here are also indications that some inspectors general have relied solely on their semiannual reports to provide information to appropriate committees and have failed to establish any other contact with them."[41] To such IGs, the committee recommended that they "should take care to assure that relationships have been established with all appropriate committees and subcommittees," and noted that "[w]hile keeping the head of the establishment informed is in the inspectors general's best interest, the public interest as well as the inspectors general's interest will be best served if the inspectors general also keep the Congress adequately informed."[42]

No Other Management Supervisory Authority over the IG. The Act empowers the IG to "make such investigations and reports relating to the administration of the

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[38] H.R. Rep. No. 100-1027, *supra* note 11, at 21-22.

[39] *Id.*

[40] *Id.* at 23 (citing staff interviews with inspectors general).

[41] *Id.*

[42] *Id.*

programs and operations of the [agency or DFE] as are, in the judgment of the Inspector General, necessary or desirable."[43] In support of this and the other authorities of the IG, section 8G of the Act stipulates that the IG "shall *not* report to, or be subject to supervision by, any other officer or employee of such designated Federal entity." (Emphasis added.) As the GAO observed:

> An IG supervised by a lower level official will inevitably be called upon at times to report audit or investigative findings in areas falling under the direct responsibility of his/her own superior. This can impair the independence of the IG in both fact and appearance, rather than giving the IG the more dependable insulation offered by the organizational independence required under the IG Act.[44]

During the course of the House Government Operations Committee's subcommittee hearings on the 1978 Act, the subcommittee received testimony from witnesses representing several federal departments that had already had some experience with OIGs established either administratively or by statute. Not surprisingly, discussion occurred with respect to the relationship between an OIG and an agency's General Counsel, who might reasonably be expected to take a professional interest in instances of fraud or other illegal activity that might be taking place in the agency and discovered by the agency's OIG.

In one example, the subcommittee discussed an incident in which the then Office of Investigation at the U.S. Department of Agriculture ("USDA") had discovered a case of alleged bribery of USDA officials by a rice exporter and sought to turn the information over to DOJ. The pertinent testimony indicated that the USDA General Counsel never referred the matter to DOJ, in effect putting a stop to the investigation.[45] Ultimately, the hearings revealed 24 instances over a two-year period in which cases referred by the Office of Investigation were held for more than six months by USDA's General Counsel before they were sent to DOJ, and one case was held for more than two years.[46] The subcommittee's review of procedures at other federal agencies showed that some agencies required all referrals to go through the OGC, while others did not.[47]

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[43] 5 U.S.C. app. 3 § 6(a)(2).

[44] GAO Report, *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, GAO-AIMD-94-39, at 4 (Nov. 1993).

[45] *Establishment of Offices of Inspector General: Hearings before a Subcomm. of the House Comm. on Gov't Ops.*, *supra* note 23, at 413, 425, 432-33 (statement of James R. Naughton, Counsel to the Subcomm. on Intergovt'l Rel. & Human Res.).

[46] H.R. Rep. No. 95-584, at 6 (1977).

[47] *Id.*

Based on the forgoing evidence, it is not surprising that the Act does not give any authority over an OIG to any entity's OGC—or to any other official apart from the entity head. In fact, neither OGCs nor any other senior agency or DFE officials (with a few exceptions not pertinent to this discussion) are even mentioned in the Act. As GAO later remarked, "with few exceptions, neither the agency heads nor subordinates are to prevent or prohibit IGs from initiating, carrying out, or completing any audit or investigation. Thus, IGs are to be insulated from the interference of senior officials, such as General Counsels."[48]

OIG Must Have Its Own Resources and Staff. Section 6 of the Act requires the head of the agency or DFE to provide the OIG with "appropriate and adequate office space at central and field office locations, together with such equipment, office supplies, and communication facilities and services as may be necessary for the operation of such offices." In later analyzing the experience of DFE IGs, GAO emphasized that it is "important that [DFE] entity heads receive the IG's unmodified budget requests and that IGs actively participate in all decisions allocating entity resources to the OIGs."[49]

In addition, an IG is authorized to select and manage its own separate OIG staff. Specifically, the Act provides:

> In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants . . . subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.[50]

By including this provision in the 1988 Act, Congress reinforced the position it took with respect to the IGs created in the 1978 Act and responded to concerns over the possibility that agencies might deny IGs the authority to hire and manage needed staff in an effort to hamper the IG's operations. As a result of the 2008 amendments to the Act, each IG is also to have its own counsel.[51] Congress enacted this provision in response to recommendations by GAO and others

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[48] GAO Report, *Inspectors General: Independence of Legal Services Provided to IGs*, GAO/OGC-95-15 at 1 (Mar. 1995).

[49] *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 5.

[50] 5 U.S.C. app. 3 § 8G(g)(2).

[51] Pub. L. No. 110-409, *supra* note 30, § 6.

who expressed doubt that attorneys located in an agency's OGC could provide the independent legal services necessary to an OIG.[52]

Through such provisions, Congress recognized that an OIG's independence could be compromised by having to rely on any other officials or personnel of its agency or DFE for its basic operating tools and took steps that were unambiguously designed to prevent that.

Access to Information. Section 6 of the Act authorizes an OIG to have access, without limitation, to the internal information and records necessary to carrying out the IG's responsibilities. Specifically, the Act states:

> [E]ach Inspector General, in carrying out the provisions of this Act is authorized . . . to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act . . . .[53]

The Act provides that when, in an IG's judgment, the information requested is "unreasonably refused or not provided," the IG is required to report the circumstances to the agency or DFE head.[54] An IG is further authorized to "require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data. . . and documentary evidence necessary" to the performance of the IG's duties[55] and to administer an oath or take an affidavit from "any person" whenever necessary in the performance of the IG's statutory functions.

These provisions are described in the Act's legislative history as among the several authorities that collectively serve as the foundation of IG independence.[56] Congress made clear its intent that IGs have unfettered access to all information within the possession or control of the agency or DFE that is necessary to an IG audit or investigation. Congress did *not* qualify the provision in any way, *i.e.*, Congress did not restrict the IG to reasonable access or access obtained upon consultation with the custodian of the records, or impose any other

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[52] *Inspectors General: Independence of Legal Services Provided to IGs*, *supra* note 48, at 1.

[53] 5 U.S.C. app. 3 § 6(a)(1).

[54] *Id.* § 6(b)(2).

[55] *Id.* § 6(a)(4). An IG's subpoena power is reserved for obtaining documents and information outside the agency or DFE, *e.g.*, from contractors or other third parties. *See id.*

[56] 124 Cong. Rec. S15871 (daily ed. Sept. 22, 1978) (statement of Sen. Eagleton) (describing the IG appointment process, direct reporting relationships, discretionary authority, subpoena power, and "access to all records, reports, documents, or materials available to the agency . . ." as "fundamental" to IG independence).

restriction or limitation.[57] Reflecting on the Act ten years later, the Senate Governmental Affairs Committee confirmed that the Act authorized each IG to "conduct audits and investigations *without hindrance* . . . [and] with *broad authority* to obtain information in aid of such audits and investigations."[58]

This provision has consistently been interpreted to mean that the IG has *direct* access to information the IG is seeking.[59] In addition, GAO has affirmed that it regards restrictions on an IG's access to "records, government officials, or other individuals needed to conduct the audit" as examples of "impairments" to IG independence.[60]

No Reprisals against Cooperating Employees. Section 7 of the Act provides that:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not . . . take or threaten to take any [such] action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

This provision protects the IG's access to necessary information and materials by protecting, from the threat of reprisal for their cooperation, those within the agency or DFE who are in a position to assist the IG.

Direct Referral of Criminal Matters to the Attorney General. Based in part on information obtained in congressional hearings regarding the interference of some OGCs in OIG investigations leading to criminal referrals, as described above, Congress did not give agency or DFE OGCs any role in reviewing, commenting on, or clearing referrals of criminal activity by the OIGs to DOJ. In large part, it appears that Congress deferred to DOJ's position in this matter. The House Government Operations Committee's 1977 report on the IG legislation expressly stated that DOJ witnesses had endorsed direct referral of criminal matters by the IGs to

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[57] *See, e.g.*, H.R. Rep. No. 95-584, *supra* note 46, at 14 (stating that the legislation "makes clear that each Inspector General is to have access to all records, documents, et cetera, available to his or her agency which relate to programs and operations with respect to which the office has responsibilities").

[58] S. Rep. No. 100-150, *supra* note 8, at 5 (emphasis added).

[59] *See, e.g.*, GAO Report, *Highlights of the Comptroller General's Panel on Federal Oversight and the Inspectors General*, GAO-06-931SP, at 1 (Sept. 2006).

[60] GAO Report, *Inspectors General: Proposals to Strengthen Independence and Accountability*, GAO-07-1021T, at 2 (June 20, 2007).

the Department.[61] Therefore, the Act provides that "in carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."[62]

Compliance with Comptroller General Standards for Auditor Independence. The Act requires each IG to "comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions."[63] The current *Government Auditing Standards* ("*Auditing Standards*") clearly reaffirm for all government-related auditing functions certain principles of independence that are similar or identical to the independence safeguards adopted by Congress in the Act.[64] The *Auditing Standards* also set forth in detail the specific elements that characterize such independence, among them the following:[65]

> 3.02 In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments of independence.
>
> 3.03 Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information. Auditors should avoid situations that could lead objective third parties with knowledge of the relevant information to conclude that the auditors are not able to maintain independence and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the audit and reporting on the work.

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[61] H. Rep. No. 95-584, *supra* note 46, at 6.

[62] 5 U.S.C. app. 3 § 4(d).

[63] *Id.* § 4(b)(1)(A).

[64] *Gov't Auditing Standards*, *supra* note 3, at Ch. 3.

[65] *Id.* at 29.

The *Auditing Standards* also advise government auditors who perceive that their independence has been impaired to disclose such impairments in their audit reports.[66] By building GAO audit standards into the Act, Congress emphasized and clarified the necessity of IG independence.

Other Authorities of the IG. In addition to the above-mentioned authorities available to the IG to carry out investigations and audits as necessary in the IG's judgment, the IG may receive and investigate complaints from agency or DFE employees concerning any possible "violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."[67] The IG is also authorized to enter into "contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act."[68] The IG may also request information or assistance from any federal, state, or local government agency as necessary to carry out the IG's responsibilities.[69] Each of these reaffirms Congress's intention to give IGs the information and resources necessary to maintain absolute objectivity and independence in the performance of their duties.

C. Extending the Act to Amtrak and its Safeguards to the Amtrak OIG

1. Congress Wanted to Expand a Successful Model

In 1988, Congress amended the IG Act to create OIGs at additional departments and agencies. The 1988 Act also defined a new class of federal entity in which the federal government had an interest—the DFEs. Although most of the individual DFEs were smaller federal agencies (*e.g.*, the Federal Election Commission and the Securities and Exchange Commission), collectively they represented a significant amount of federal spending. Pursuant to the 1988 amendments, an OIG was established at Amtrak in 1989.

The legislative history of the 1988 amendments does not include any substantive debate over the creation of an OIG at Amtrak. It appears the amendments included Amtrak because Amtrak was one of many entities that received annual federal funding in excess of $100 million.[70] Nevetheless, the Senate report also noted that GAO had found that the existing

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[66] *Id.* at 30 (Sec. 3.04).

[67] 5 U.S.C. app. 3 § 7.

[68] *Id.* § 6(a)(9).

[69] *Id.* § 6(a)(3).

[70] In fiscal year 1988, Amtrak's appropriated funds totaled around $600 million. GAO Report, *Amtrak: Deteriorated Financial and Operating Conditions Threaten Long-Term Viability*, GAO/T-RCED-95-142, at 4 (Mar. 23, 1995). A separate statute provides that Amtrak will no longer be subject to the statutory OIG requirement following the first fiscal year in which it no longer receives a federal subsidy. Pub. L. No. 105-134 § 409(a)(2) (1997).

auditing and investigative functions of several agencies and other entities (including Amtrak) had several problems that the 1988 amendments were intended to remedy. Specifically, GAO reported that Amtrak had "multiple audit or investigative units" but "no written procedures for coordinating the audit or investigative efforts."[71] In another report, GAO listed Amtrak among the "agencies" not meeting government audit standards because of the organizational placement of its audit staff.[72] A table in the report shows that Amtrak's Internal Audit Department reported to the Vice President for Law, while the Contract Audit Department reported to the Controller.[73] As a result, Amtrak was identified as one of several entities having "external or organizational impairments to audit independence" because the heads of Amtrak's audit units did not report to Amtrak's Chairman.[74]

2. *DFE IGs Given the Same Powers and Duties as Presidentially Appointed IGs*

Although IGs at the DFEs (including Amtrak) are appointed by the heads of the respective entities, rather than the President, they "have essentially the same powers and duties as the presidentially-appointed IGs."[75] Accordingly, Amtrak's IG has the same duties and responsibilities as all other IGs (as more fully described above in subsection B). The comparison in **Table 1** of the statutory differences between the presidentially appointed IGs and those appointed by their entity heads demonstrates that the only differences are primarily administrative in nature and generally reflect that presidentially appointed IGs were created at federal departments and agencies that are significantly larger than DFEs and that employ personnel drawn from the civil service or Senior Executive Service; substantively, the Amtrak and other DFE IGs have the same audit and investigative authorities as the presidentially appointed IGs.

See **Table 1**, next page.

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[71] GAO Report, *Status of Internal Audit Capabilities of Federal Agencies without Statutory Inspectors General*, GAO/AFMD 84-45, App. VIII at 16 (May 4, 1984).

[72] GAO Report, *Internal Audit: Non-Statutory Audit and Investigative Groups Need to Be Strengthened*, GAO/AFMD 86-11, at 18 (June 3, 1986).

[73] *Id.*

[74] *Id.* at 30.

[75] GAO Report, *Federal Inspectors General: An Historical Perspective*, GAO/T-AIMD-98-146, at 2 (Apr. 21, 1998).

Table 1 – Comparison of Presidentially Appointed and DFE Inspectors General

PRESIDENTIALLY APPOINTED IGS	DFE IGS
Appointed by the President with the advice and consent of the Senate 5 U.S.C. app. 3 § 3(a)	Appointed by the DFE head [Chairman of Amtrak] in accordance with the applicable laws and regulations governing appointments within the DFE 5 U.S.C. app. 3 § 8G(c)
Under the general supervision of the agency head or deputy 5 U.S.C. app. 3 § 3(a)	Under the general supervision of the DFE head 5 U.S.C. app. 3 § 8G(d)
Removal or transfer by the President who shall communicate the reasons in writing to both Houses of Congress not later than 30 days before the removal or transfer Pub. L. No. 110-409 § 3(a)	Removal or transfer by the DFE head who shall communicate the reasons in writing to both Houses of Congress not later than 30 days before the removal or transfer Pub. L. No. 110-409 § 3(a)
IGs shall appoint separate Assistant IGs for Auditing and Investigations 5 U.S.C. app. 3 § 3(d) IG authority to select, appoint, and employ such officers and employees as may be necessary, subject to certain provisions of Title 5, U.S. Code (provisions regarding the competitive service and general schedules—in general, the civil service) 5 U.S.C. app. 3 § 6(a)(7)-(8)	IG authority to select, appoint, and employ such officers and employees as may be necessary, subject to the laws and regulations governing the DFE 5 U.S.C. app. 3 § 8G(g)(2)
OIGs have separate appropriations accounts 31 U.S.C. § 1105(a)(25)	Not applicable to DFEs—in practice, Congress has earmarked funds for Amtrak's OIG in recent appropriations bills
IGs to be paid at Executive Level III, plus 3 percent Pub. L. No. 110-409 § 4(a)	IGs to be paid and classified at a "grade, level, or rank designation" (as appropriate to the DFE) at or above those of a majority of the senior level executives at the DFE (such as General Counsel, Chief Financial Officer, etc.). For an IG whose pay is adjusted under this provision [which was enacted in 2008], the adjustment cannot be more than 25% of the IG's average total compensation for the prior 3 fiscal years. The pay of a DFE IG to be not less than the average total compensation (including bonuses) of the senior level executives of the DFE calculated on an annual basis Pub. L. No. 110-409 § 4(b)(1)

D. Other Standards of IG Independence

As discussed in detail above, Congress has created numerous IGs for cabinet departments, executive branch agencies, and DFEs, including Amtrak, to act as "watchdogs" over federal programs and expenditures. To maintain the objectivity that is essential to the effective performance of an IG's mission, Congress incorporated into the Act a number of safeguards intended to protect and enhance IG independence.

The IGs' direct reporting relationship with Congress and the obligation of a DFE agency head to inform Congress in advance of an IG's removal are regarded as establishing a special relationship between Congress and the IGs that undergirds IG independence. However, Congress did not include in the Act a centralized federal entity (other than itself) with general responsibility for assuring IG independence or to provide other guidance to IGs in the performance of their statutory missions. Over time, however, other governmental and non-governmental organizations have at least partially filled that role.

The President's Council on Integrity and Efficiency ("PCIE") (for presidentially appointed IGs) and the Executive Council on Integrity and Efficiency ("ECIE") (for agency-appointed IGs) were created by presidential Executive Orders and acted as forums for IGs to work together and coordinate their professional activities.[76] Chaired by the OMB's Deputy Director for Management, the Councils performed valuable work on behalf of the IGs by, among other endeavors: developing uniform standards for the conduct of the audit, investigative, and inspection and evaluation functions of the IGs; supporting the IGs' professional and management development through training programs; and advocating issues of common concern or interest among the IGs.[77]

The Councils did not have any authority to enforce the congressionally mandated safeguards in the Act for IG independence.[78] OMB nevertheless published periodic guidance regarding the IGs, including, in November 1992, *Inspectors General in Designated Federal Entities: Key Statutory Provisions and Implementing Guidance* ("*Guidance*").[79] Although the

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[76] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *A Progress Report to the President* at 1 (FY 2007) *available at* http://www.ignet.gov/randp/rpts1.html.

[77] *Id.* at 22.

[78] In the IG Reform Act of 2008, Congress replaced the PCIE and ECIE with a new statutory Council of the Inspectors General on Integrity and Efficiency ("CIGIE") whose mission is to "address integrity, economy, and effectiveness issues that transcend individual Government agencies" and increase the IGs' "professionalism and effectiveness" by "developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General." Pub. L. No. 110-409, *supra* note 30, § 7. Although the new Council is not expressly charged with assuring IG independence, it is possible that the Council may address ways that federal agencies and DFEs can support and enhance the independence of their IGs as part of its mission to develop standards that promote highly skilled OIGs.

[79] No citation available; author's copy received from Amtrak OIG.

Guidance was primarily directed to DFE heads with respect to the process of selecting their IGs, it also addressed other facets of OIG operations, including operational independence. Following are some of the highlights of this *Guidance*:

- Entity heads should ensure that the support staff skilled in personnel and procurement functions who are assisting the IGs understand the distinct personnel and procurement authorities of the IG and the need expeditiously to support the IG in the exercise of those authorities.[80]

- Entity heads cannot delegate budget formulation and budget execution decisions regarding the IG to an officer or employee subordinate to the entity head.[81]

- Entity audit and investigative functions should be carried out by the OIG. However, the statutory requirement for operational independence does not preclude communication between and cooperation with the OIG and entity management.[82]

- The IGs' need for legal advice and assistance may be met by employing counsel within the OIGs. However, when it is not cost effective to have attorneys on staff, and the IGs therefore need to rely on the entity General Counsel, the IGs and entity General Counsels are urged to enter into written memoranda of understanding delineating the role of the General Counsel when providing legal advice and assistance to the IG, so as to preserve the operational independence of the IG.[83]

The IGs have also developed a special relationship with GAO because the IGs and GAO have complementary roles in investigating waste, fraud, and abuse in government programs. In addition, the IG Act requires each IG to "comply with standards established by the Comptroller General of the United States [the head of GAO] for audits of Federal establishments, organizations, programs, activities, and functions."[84]

As a result of this relationship, GAO has periodically monitored and reported to Congress on the operations and effectiveness of IGs and has identified and brought to the attention of Congress problems regarding agency encroachments on IG independence.[85] Among

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[80] *Id.* at 6.

[81] *Id.* at 6-7.

[82] *Id.* at 8.

[83] *Id.* at 9.

[84] 5 U.S.C. app. 3 § 4(b)(1)(A).

[85] *See, e.g., Inspectors General: Proposals to Strengthen Independence and Accountability, supra* note 60.

these problems have been (1) IGs at DFEs supervised by management officials other than the entity head; and (2) entity officials who competed with IGs for agency resources making decisions affecting the IGs' budgets.[86] Other problems cited by GAO involved unproductive relationships between IGs and their agencies' Offices of General Counsel.[87]

GAO, both through the Comptroller General's *Auditing Standards* and GAO's periodic reports, has emphasized independence as one of the most important elements of an effective IG function.[88] GAO has focused particularly on standards for IG independence so that an IG can act as an effective auditor. As noted above, the *Auditing Standards* caution that audit organizations must avoid real or perceived impairments to their independence so that their opinions and findings will be impartial and will be viewed as impartial by objective third parties.[89]

The *Auditing Standards* and GAO reports make specific recommendations to preserve auditor independence in the three areas described, which are summarized here briefly.

- Personal Independence: The auditor must maintain an "independent and objective state of mind that does not allow personal bias or the undue influence of others to override the auditor's professional judgments." The auditor also must be free of "direct financial or managerial involvement with the audited entity or other potential conflicts of interest that might create the perception that the auditor is not independent."[90]

- External independence: The auditor and the organization should be free to make independent and objective judgments without "external influences or pressures" from other individuals or divisions within the entity that is being audited. GAO cited as some examples of impairments to such external independence the following: "restrictions on access to records, government officials, or other individuals needed to conduct the audit; external interference over the assignment, appointment, compensation, or promotion of audit personnel; restrictions on funds or other resources provided to the audit organization that adversely affect the

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[86] GAO Report, *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 4.

[87] GAO Report, *Inspectors General: Independence of Legal Services Provided to IGs*, *supra* note 48, at 5 (describing how an OGC had once directed the IG's attorney in writing not to provide legal advice to the IG on a particular issue).

[88] *See, e.g.*, GAO Report, *Inspectors General: Independent Oversight of Financial Regulatory Agencies*, GAO-09-524T, at 5 (Mar. 25, 2009).

[89] *Gov't Auditing Standards*, *supra* note 3, at 29.

[90] GAO Report, *Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60, at 2.

audit organization's ability to carry out its responsibilities; or external authority to overrule or to inappropriately influence the auditors' judgment as to appropriate reporting content."[91]

- Organizational independence: GAO has observed that IGs at DFEs such as Amtrak have the characteristics of internal auditors rather than external auditors.[92] The *Auditing Standards* indicate that internal auditors "can be presumed to be free from organizational impairments to independence" if certain criteria are met that, in effect, parallel many of the statutory safeguards of IG independence included in the Act.[93] Among the additional standards included within organizational independence, the *Auditing Standards* specifically state that the auditor must be "sufficiently removed from political pressures to conduct audits and report findings, opinions, and conclusions objectively without fear of reprisal."

The *Auditing Standards* further state that the internal auditor "should document the conditions that allow it to be considered free of organizational impairments to independence for internal reporting and provide the documentation to those performing quality control monitoring and to the external peer reviewers to determine whether all the necessary safeguards have been met."[94]

Apart from the standards adopted or recommended by OMB and GAO, several of the larger federal departments have adopted internal procedures on the organization and functions of their OIGs. For example, the Department of Health and Human Services ("HHS") periodically publishes and updates a *Statement of Organization, Functions, and Delegations of Authority* ("*Statement*") which outlines the operations of the HHS OIG and defines the relationships between the OIG and certain other officials or divisions of HHS.[95] Although the HHS IG is presidentially appointed and has oversight over one of the largest federal establishments, the duties and responsibilities of the HHS OIG and Amtrak's OIG are substantially the same. Therefore, the HHS *Statement* provides a useful example of a carefully crafted set of operating principles. Among the key provisions of the HHS *Statement* are the following:

- "In keeping with the independence conferred by the Inspector General Act, the Inspector General assumes and exercises, through line management, all functional

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[91] *Id.*

[92] *Id.* at 5.

[93] *Gov't Auditing Standards*, *supra* note 3, at 39.

[94] *Id.* at 40.

[95] Statement of Organization, Functions, and Delegations of Authority, 70 Fed. Reg. 20,147 (Apr. 18, 2005).

authorities related to the administration and management of OIG and all mission-related authorities stated or implied in the law or delegated directly from the Secretary."[96]

- "The Inspector General provides executive leadership to the organization [*i.e.*, to the OIG] and exercises general supervision over the personnel and functions of its major components."[97]

- "The Inspector General determines the budget needs of OIG, sets OIG policies and priorities, [and] oversees OIG operations . . . . By statute, the Inspector General exercises general personnel authority, e.g., selection, promotion, and assignment of employees . . . ."[98]

- A component of the OIG—the IG's Office of Management and Policy—"formulates and oversees the execution of the budget and confers with the Office of the Secretary, the Office of Management and Budget, and the Congress on budget issues."[99]

- Another component of the OIG—the Office of Counsel to the Inspector General ("OCIG")—"is responsible for providing all legal services and advice to the Inspector General . . . and all of the subordinate components of the [OIG], in connection with OIG operations and administration, OIG fraud and abuse enforcement and compliance activities . . . ."[100]

- OCIG "provides legal advice to the various components of OIG on issues that arise in the exercise of OIG's responsibilities under the Inspector General Act of 1978. Such issues include the scope and exercise of the Inspector General's authorities and responsibilities; investigative techniques and procedures . . . and the conduct and resolution of investigations, audits, and inspections."[101]

- OCIG "evaluates the legal sufficiency of OIG recommendations and develops formal legal opinions to support these recommendations. When appropriate, the

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[96] *Id.*

[97] *Id.* 20,148.

[98] *Id.*

[99] *Id.*

[100] *Id.* 20,149.

[101] *Id.*

office coordinates formal legal opinions with the HHS Office of the General Counsel."[102]

- OCIG provides legal advice on OIG internal administration and operations, including appropriations, delegations of authority, OIG regulations, personnel matters, the disclosure of information under the Freedom of Information Act . . . and defends OIG in litigation matters as necessary.[103]

E. Summary

Amtrak's OIG has been charged by Congress to act as a "watchdog" in support of the congressional mandate to protect the taxpayers' money and to contribute to the efficient, effective, and lawful conduct of Amtrak's operations. In furtherance of that mission, Congress has vested Amtrak's OIG with significant responsibility, far-reaching authorities, and extraordinary independence equal to those of OIGs in the largest federal departments. In particular, Congress deliberately extended to Amtrak's OIG the same safeguards of independence that apply to all other statutory IGs in the federal government. In the 20 years that have passed since establishment of the Amtrak OIG, the Act's safeguards for the OIG's independence have not diminished. Rather, they have been strengthened, with the expectation that the OIG can rededicate itself to the task of identifying and helping to remedy instances of waste, fraud, or abuse in Amtrak's operations. It is with those standards of independence in mind that we turn to a discussion of the current Amtrak policies and practices that we have been asked to review.

IV. CURRENT AMTRAK POLICIES AND PRACTICES GOVERNING OIG OPERATIONS

A. Introduction

The policies and practices at Amtrak that the OIG has asked Willkie to review—issues of Law Department oversight of the OIG, access to documents, and budgetary and personnel independence—first arose following several management reviews of the Amtrak Law Department conducted by GAO and the OIGs of Amtrak and the Department of Transportation ("DOT") between 2004 and 2007. These reviews focused on alleged mismanagement of outside law firms by the Amtrak Law Department and resulted in considerable and unfavorable publicity for Amtrak. Following some of the media reports, the Law Department accused the Amtrak OIG of breaching Amtrak's attorney-client privilege with respect to some of the information the Law Department had provided to the OIG.

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[102] *Id.*

[103] *Id.*

An assessment of those previous investigations or the significance, if any, of the alleged breach of privilege is beyond the scope of this report. Nevertheless, a brief discussion of those events follows in the next section in order to place in context the policies and practices regarding Law Department review of OIG document requests and other aspects of OIG oversight that are the subject of this report and are discussed in the sections that follow. Following that brief discussion of the background of the GAO, Amtrak OIG, and DOT OIG investigations, this section discusses the particular policies and practices at Amtrak that Willkie Farr has been asked to review.

B. Background

1. The GAO and OIG Joint Reviews

In 2004, the Chairman of the House Transportation and Infrastructure Committee (hereinafter "Committee")—which has legislative and oversight jurisdiction over Amtrak—asked GAO to examine Amtrak's management and performance.[104] GAO's review included a brief look at Amtrak's management of legal fees. According to GAO's subsequent report, the Law Department generally failed to protect Amtrak's interests in retaining and monitoring outside counsel.[105] Specifically, the report identified several problems related to Amtrak's procurement of outside counsel, including: lack of competition in selecting firms; lack of "spend analysis" on outside legal services; lack of specificity in documenting terms and conditions of the services to be provided; inconsistent review of invoices for compliance with established billing guidelines; inadequate documentation supporting purchases for certain matters; and lack of segregation of key approval and payment functions.

After receipt of this report from GAO, the Committee asked the DOT and Amtrak OIGs to conduct a more detailed examination of the Law Department issues raised by GAO.[106] The two OIGs formed a Joint Review Team ("JRT"), which ultimately confirmed and elaborated on the conclusions reached by GAO, including the following:

- Amtrak's Law Department failed to enforce Amtrak's *Billing Guidelines*. The JRT found inadequate management of outside counsel staffing and rates; insufficient review of outside counsel legal billing; failure to request and manage

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[104] GAO Report, *Amtrak Management – Systemic Problems Requiring Actions to Improve Efficiency, Effectiveness, and Accountability*, GAO 06-145, at 2 (Oct. 4, 2005). *See also* Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services (PowerPoint).

[105] *Amtrak Management – Systemic Problems Requiring Actions to Improve Efficiency, Effectiveness, and Accountability, supra,* at 118-123.

[106] Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services, *supra* note 104.

budgets for legal services; and failure to perform audits anticipated by the *Billing Guidelines*.[107]

- Amtrak did not sufficiently train its in-house legal staff on the *Billing Guidelines'* requirements, which led to misinterpretation or insufficient knowledge of the *Billing Guidelines*. The JRT found that Amtrak routinely accepted "block billing" (prohibited by the *Billing Guidelines*) and paid for work by higher-paid attorneys and staff that could have been performed by lower-paid staff. The JRT discovered duplicate payments and a lack of detailed information regarding legal work performed by outside counsel.

- The JRT found that the Law Department lacked standard record-keeping policies. Although the *Billing Guidelines* prohibit Amtrak from reimbursing firms for mark-ups on expenses, only one of the ten law firms in the sample routinely submitted receipts or other evidence of reimbursable expenses.

- Finally, the JRT found that in-house counsel signed retainer agreements with outside counsel that supplanted the *Billing Guidelines*. The terms of such agreements were often substantially less beneficial to Amtrak and more beneficial to the outside counsel.

In connection with the JRT review, in June 2005 Amtrak's OIG also retained John W. Toothman, a legal fee management and litigation consultant, to draft an independent expert report that had been requested by Congress in connection with the JRT review.[108] Toothman's review included an examination of the Law Department's management of outside law firms as well as a review of the bills and supporting data of the outside law firms billing the largest amounts to Amtrak. His confidential report to Congress was submitted in May 2006.[109]

Toothman's report largely confirmed the GAO and JRT findings. While noting that Amtrak's *Billing Guidelines* were "excellent" and provided "a strong basis for Amtrak to manage its lawyers," Toothman observed that the Law Department had failed to "enforce its own guidelines, resulting in excessive and wasteful legal bills." He recommended that Amtrak select firms "with the right expertise" instead of hiring a handful of firms for all matters and that the Law Department enforce its *Billing Guidelines* (without special agreements), obtain budgets, and reconcile budgets with bills.

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[107] *Id.* at 10.

[108] The Toothman Law Firm, PC Billing Agreement (June 15, 2005); John W. Toothman, Confidential Report: Review of Amtrak Law Department Performance (May 31, 2006).

[109] Confidential Report: Review of Amtrak Law Department Performance, *supra*.

2. *Alleged Disclosure of the JRT Reports and Congressional Referrals to DOJ*

Amtrak IG Fred Weiderhold has reported that, as the JRT's work was winding down in September 2006, Amtrak's then Chairman, David Laney, met with Weiderhold to discuss the Law Department review.[110] During the meeting, Laney told Weiderhold that he believed Weiderhold had leaked the OIG's report to the Wall Street Journal. Weiderhold denied Laney's allegation but confirmed that he had spoken with the Wall Street Journal about another report—related to the Engineering Department, not the Law Department.

Subsequently, in October 2006, the OIG authorized Toothman to disclose to the Committee any information, including any privileged or confidential information, relating to "the Amtrak/DOT OIG Joint Review report, [Toothman's] independent expert report, and the separate ongoing T&I Committee inquiry of the Amtrak Law Department,"[111] but only on condition that Toothman "specifically identify the information as privileged and/or confidential and notify the Committee accordingly." In addition, the OIG authorized disclosure of any information, including "pre-existing redacted (non-privileged) reports," at the request of the Committee, but refused to authorize "disclosure of any Amtrak privileged or confidential information to a third party." Later that month, a redacted copy of the Toothman Report was released by the House Committee[112] and the JRT's report was publicly released.[113] However, the Legal Times obtained an unredacted (*i.e.*, privileged) copy of the Toothman Report and published an article about it on November 7, 2006.[114] It is unclear how the Legal Times obtained an unredacted copy.

The Law Department regarded the leak of the unredacted Toothman Report as damaging to Amtrak. Counsel for the Law Department characterized the information contained in the report as "highly sensitive and privileged information regarding then-ongoing discovery disputes and settlement strategy."[115] The OIG maintains that it has neither been informed about nor is aware of any specific Amtrak legal matter adversely impacted by release of the information.

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[110] Undated draft letter from Fred Weiderhold to Chairman Young and Rep Mica at 2.

[111] Oct. 24, 2006 Letter from Fred Weiderhold to John W. Toothman.

[112] Anna Palmer, *Report Shows Law Firms' Railroad Ties*, Legal Times, Nov. 7, 2006.

[113] Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services, *supra* note 104.

[114] Palmer, *supra* note 112.

[115] *See* June 19, 2007 Letter from Fried Frank LLP to OIG at 2.

Shortly following the events above, in November 2006 Committee Chairman Young and Representative Mica, a member of the Committee's Subcommittee on Railroads, asked the OIG to conduct an investigation into certain invoicing and expense charges to Amtrak by the law firm Manatt, Phelps & Phillips, LLP ("Manatt").[116] In connection with the request, the OIG was asked to report any instances of non-cooperation or significant hurdles imposed by the Law Department. A month later, Young and Mica sent letters to Attorney General Alberto Gonzalez requesting that the DOJ review potential "unlawful conduct" involving Amtrak's legal team and outside law firms.[117] Amtrak's Law Department subsequently received copies of both referral letters from a Legal Times reporter.[118]

Upon learning about the congressional referral letters to DOJ, Amtrak's then General Counsel Alicia Serfaty, concerned about the allegations of unlawful conduct,[119] sought, under section VI of Amtrak's 1992 "EXEC-1" (Amtrak's internal procedures relating to the OIG),[120] "an Administrative Report that documents the OIG's findings" to allow her to "take appropriate action." OIG Counsel Colin Carriere responded that the OIG could not provide more information to Serfaty at that time because, among other things, the investigation was ongoing. Carriere stated that he believed Serfaty had misread the requirements of the EXEC-1 and he emphasized the necessity of independence in OIG investigations.

In December 2006, Chairman Laney sent a separate memorandum to the IG regarding the two congressional letters,[121] also requesting that the OIG "promptly provide [him] with succinct, detailed summaries of [OIG's] current findings or conclusions regarding each of the matters . . . together with information your office has obtained that supports such allegations of illegal or inappropriate behavior."[122]

The OIG responded that because the matter was under review by DOJ, it could not provide the requested information. The OIG indicated, however, that it would provide the

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[116] Nov. 17, 2006 Letter from Chairman Young and Rep. Mica to OIG.

[117] Dec. 4, 2006 Letter from Chairman Young & Rep. Mica to the Attorney General.

[118] Memorandum from Alicia Serfaty to Fred Weiderhold on the Joint Review (Dec. 12, 2006).

[119] *Id.*

[120] *See* section IV.C *infra*.

[121] Memorandum from David Laney to Fred Weiderhold on Young/Mica Letter of Dec. 4, 2006; Request for Information & Supporting Documentation (Dec. 20, 2006).

[122] *Id.*

Board of Directors with prompt notifications and reports at the conclusion of investigations where Board or management action "may be warranted."[123]

3. Events Leading Up to the Adoption of a Law Department-OIG "Protocol"

In February 2007, the OIG issued a subpoena to Manatt for documents related to the investigation.[124] Manatt retained counsel at Zuckerman Spaeder LLP, with which the OIG then corresponded extensively regarding the production of documents, production deadlines, and issues of attorney-client privilege, attorney work product, privacy, and confidentiality.[125]

Between February and April 2007, D. Hamilton Peterson and Phyllis Sciacca of the OIG also repeatedly communicated with Amtrak's new General Counsel, Eleanor Acheson, regarding the Manatt subpoena.[126] Communication with Acheson regarding the subpoena was necessary because Manatt refused to produce documents to the OIG without the Law Department's consent. Although we have not interviewed Acheson, we have reviewed multiple e-mail exchanges between the OIG and Acheson in which the OIG attempted to meet with Acheson to discuss this matter. Although Acheson and the OIG did meet once, no progress was made in obtaining the Law Department's consent to the OIG's document request. This delay prevented the OIG from receiving the documents, even though Zuckerman Spaeder was otherwise ready by early April to produce the first installment.

Amidst this activity, in April 2007, Acheson e-mailed IG Weiderhold asking him to enter into a written "protocol" governing the Law Department's cooperation in OIG investigations.[127] Among other things, Acheson asked that: (1) Acheson herself be the exclusive Law Department contact for all communications from OIG personnel; (2) OIG agree not to waive attorney-client privilege or work product protections for documents and agree not to turn over any documents to third parties; (3) OIG provide the Law Department with reasonable notice of any future document requests or potential interviews to allow the Law Department sufficient time to work out appropriate arrangements, and (4) OIG provide any reports of investigation to the Law Department before providing them to Amtrak's Board of Directors or any third party, including DOJ. Acheson's request resulted in lengthy negotiations between the OIG and the

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[123] Memorandum from Hamilton Peterson to David Laney on Your Memorandum of Dec. 20, 2006, Request for Information & Supporting Documentation (Dec. 28, 2006).

[124] OIG Subpoena to Custodian of Records, Manatt, Phelps & Phillips, LLP (Feb. 1, 2007); Feb. 8, 2008 Letter from Zuckerman Spaeder LLP to OIG.

[125] Feb. 22, 2007 Letter from Zuckerman Spaeder LLP to OIG; Mar. 28, 2007 Letter from OIG to Zuckerman Spaeder LLP.

[126] Conversation with D. Hamilton Peterson memo.

[127] *Id.*

Law Department.[128] The OIG believed that many of the Law Department's proposals violated the OIG's statutory independence.

In May 2007, the OIG arranged a meeting at DOJ with two senior Fraud Section attorneys in an attempt to resolve the stalemate. The meeting was attended by Peterson and Sciacca on behalf of the OIG, the two senior Fraud Section attorneys, and Michael Bromwich of Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"), which the Law Department had hired to represent it in connection with the OIG investigation. We understand that the DOJ attorneys told Bromwich that the OIG's position was well grounded under the statute and relevant case law and that the Law Department had an obligation to consent to Manatt's production of the requested documents to OIG. We also understand that the DOJ attorneys maintained that the Law Department's failure to cooperate would be contrary to law.

Negotiations on a protocol continued with a new draft provided by the OIG, which incorporated the concepts discussed at the DOJ meeting.[129] The Law Department's counsel at Fried Frank proposed changes to the OIG's draft which the OIG refused to accept on grounds that the changes violated the IG Act and would undermine the integrity of OIG investigations.[130]

Sometime in early October, Chairman Laney presented Weiderhold[131] with two original versions of a draft protocol that Acheson had signed and which Laney had purportedly played a key role in drafting.[132] Weiderhold responded with a substitute draft, but Laney rejected it and directed Weiderhold to respond "immediately" to Laney's draft.[133] Weiderhold complied with what he has described as Laney's "directive," making a few proposed "changes."[134] Weiderhold also sent a last-minute e-mail to an Amtrak Board member in an effort

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[128] *Id.*

[129] *Id.*; Draft Memorandum of Understanding Regarding Privileged Materials (undated).

[130] Draft Fried Frank Revision of the Memorandum of Understanding Regarding Privileged Materials (May 16, 2007).

[131] Peterson conversation, *supra* note 126.

[132] Oct. 2, 2007 handwritten note from Eleanor Acheson to Fred Weiderhold.

[133] Oct. 10, 2007 e-mail from David Laney to Fred Weiderhold.

[134] Oct. 10, 2007 e-mail from Fred Weiderhold to David Laney.

to avoid "compromising the IG Act" under the pressure he felt he was getting from Laney.[135] Ultimately, the IG believed he had no choice and signed the protocol on October 10, 2007.[136]

C. The 2007 Protocol and Revised EXEC-1

A copy of the Protocol is attached as **Exhibit A**. Under the Protocol, the parties acknowledge that the OIG is entitled to obtain and review any and all information that the OIG considers necessary or appropriate to conduct its investigation, but prohibits the OIG from disclosing Amtrak information to any third party, except DOJ or as otherwise *required* by law, and even then only upon prior notification to and review by the Law Department. On its face, this restriction would presumably mean OIG may only disclose Amtrak information to Congress as part of a semiannual report or other report of "particularly serious or flagrant problems" under section 5 of the IG Act (no other reports to Congress being "required" by law). Moreover, even then, any such report to Congress containing "Amtrak information" must first be provided to the Law Department for review and any appropriate action "to restrict or limit disclosure of such information." The Protocol also restricts the OIG in the future from engaging and sharing Amtrak information with third-party consultants such as John Toothman. Equally significant, as discussed more fully below, the Protocol has also resulted in a practice of Law Department pre-screening of *all* OIG-requested or subpoenaed documents prior to production to the OIG.

Following the adoption of the Protocol, Chairman Laney also approved a new EXEC-1 (*see* **Exhibit B, "2007 EXEC-1"**) superseding the 1992 EXEC-1 which had in been in effect for 15 years (*see* **Exhibit C, "1992 EXEC-1"**). The 2007 EXEC-1 delineates the scope, authority, and oversight of the OIG and directs Amtrak personnel in responding to OIG requests.[137] The 2007 EXEC-1 differs materially from its predecessor in two important respects. First, section 5.3 generally requires the OIG to inform the Law Department before disclosing to any third party any information obtained or developed in the performance of the OIG's duties that is "confidential, classified, proprietary, or privileged," except as required by law. The circumstances in which the exception would apply are not defined.

Second, section 7.3 of the 2007 EXEC-1 requires the OIG to notify the head of any Amtrak department from whose employees the OIG expects to identify, review, or collect information in connection with a review, audit, inspection, or investigation—before the OIG begins it work—except where notification would be "inappropriate." It also states that the OIG

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[135] *Id.*

[136] Agreed Protocol of Amtrak Office of Inspector General and Law Department Regarding Disclosure of Privileged, Classified, Proprietary or Other Confidential Information (Oct. 10, 2007).

[137] *See* 2007 EXEC-1 at 1 (Nov. 5, 2007).

should keep department heads and managers informed of "the purpose, nature and content of OIG activities concerning their respective programs or operations" when "appropriate."[138]

D. Implementation of the Protocol and EXEC-1 in Current Audits and Investigations

1. Claims Department Data

In early January 2008, OIG Associate Legal Counsel James Tatum, Jr. asked Amtrak's Deputy General Counsel Ted Kerrine to produce the files for several closed legal cases involving Amtrak's Claims Department.[139] Kerrine responded that "it was necessary for him to speak with Eleanor Acheson, General Counsel, prior to releasing the records to the OIG."[140] Tatum believed that the delay in providing these documents was significant. Later in 2008, Tatum asked Kerrine for an updated list of case files involving two attorneys representing Amtrak employees but Kerrine refused to provide the documents unless the request was made in writing, citing the Protocol and the 2007 EXEC-1.[141] No such requirement appears in either document.

In June 2008, OIG Agent Jeff Black contacted Amtrak's Claims Department asking for reports from a database that tracks all claims paid by Amtrak to employees and outside parties since January 1, 2005.[142] According to the OIG, the Claims Department had "previously provided similar information to the New York Times pursuant to a FOIA request."[143] Black was informed by Amtrak Deputy General Counsel Charles Mandolia that the request

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[138] Soon after the adoption of the 2007 EXEC-1, Amtrak Board member Donna McLean replaced Laney as Amtrak's Chairman. *See* Press Release, Amtrak, Amtrak Bd. Elects Donna McLean Chairman (Nov. 15, 2007). In response to concerns expressed by IG Weiderhold, McLean had earlier sought to revise the 2007 EXEC-1 to eliminate the restrictions imposed on the IG's authority by suggesting a number of changes to Amtrak's President and CEO, Alex Kummant. *See* Oct. 3, 2008 Letter from Alex Kummant to Donna McLean. However, Kummant rejected McLean's suggested revisions, believing that the 2007 EXEC-1 was fully legal and fully consistent with the goals and policies of the company. *Id.*

[139] *See* Memorandum from Ted Kerrine to James Tatum on Amtrak Office of Inspector General Request for Information or Materials Pursuant to Section 6(b)(2) of the Inspector General Act (Jan. 25, 2008). Amtrak's Claims Department is part of its Law Department under the General Counsel.

[140] Kerrine memo, *supra.*

[141] Memorandum from James Tatum to Colin Carriere on Law Department at 2 (Aug. 2008).

[142] Undated note from Jeff Black to Charles Mandolia.

[143] *Id.*

should have been directed to him, in writing. Despite Black's effort to "provide [Mandolia] with details of [the] request verbally" Mandolia continued to insist on a written request."[144]

In subsequent correspondence, Black questioned the legal basis for the Law Department's apparent refusal to cooperate with OIG's verbal request, and he asked for copies of any Law Department memoranda or documents discussing how employees of the General Counsel's Office should respond to OIG requests.[145] Acheson then sent an e-mail to Colin Carriere of the OIG, indicating that the Law Department would comply with Black's request, but still asking for the request in writing to avoid any confusion.[146] Acheson also characterized Black's tone as "argumentative and confrontational" and asked OIG to give her notice of investigations in accordance with section 7.3 of the 2007 EXEC-1.[147]

In August 2008, an OIG agent scheduled an interview with Kerrine regarding "an investigatory matter."[148] When the agent and an OIG auditor arrived for the interview, Amtrak's Managing Deputy General Counsel, William Herrmann, told them that the 2007 EXEC-1 and Protocol required OIG to contact the head of the Law Department to conduct an interview and that attorneys from the Law Department's outside counsel at Fried Frank would attend Kerrine's interview. Kerrine refused to be interviewed without the Fried Frank attorneys.

2. *Defeased Leases*

Around December 2008, the OIG initiated an investigation of Amtrak's treatment of defeased leases. In particular, the OIG was investigating whether Amtrak's retention of financial adviser Babcock & Brown posed a conflict of interest, on grounds that Babcock & Brown had previously worked for two of the lessors of the Amtrak equipment.[149] The OIG suspected that a former Amtrak CFO and Amtrak Treasurer may have made false statements to the U.S. Department of Transportation regarding the existence of a conflict,[150] and that the Law

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[144] *Id.*

[145] *Id.*

[146] July 2, 2008 e-mail from Eleanor Acheson to Colin Carriere.

[147] As recently reported by the Washington Post, Sen. Charles E. Grassley (R-Iowa) recently charged that top officials at the Library of Congress have "interfered with investigations conducted by its independent watchdogs and have frequently admonished investigators regarding the tone and focus of their investigations." Such attempts, Sen. Grassley wrote, "to influence and/or control [the OIG] appear to be in direct contravention of the principles underlying the creation of the Inspectors General." "Independence is the hallmark of the Inspectors General throughout the country." Ed O'Keefe, *Library Officials Accused on Interference*, Wash. Post, June 5, 2009, at A15.

[148] Tatum memo, *supra* note 141, at 6.

[149] Memorandum from OIG answering questions regarding Defeased Leases issue.

[150] *Id.*; Sept. 9, 2008 e-mail from Fred Weiderhold to Steve Patterson.

Department may have been negligent in conducting its due diligence of Babcock & Brown prior to the engagement.[151]

In connection with the investigation, the OIG sought documents and information from Babcock & Brown, the CFO, and the Treasurer. In all three cases, the Law Department insisted that it pre-screen for privilege and confidentiality any documents to be produced to the OIG.

On December 19, 2008, OIG issued a subpoena to Babcock & Brown.[152] Babcock & Brown's counsel, O'Melveny & Myers LLP, notified the OIG in February 2009 that it had responsive documents but that Amtrak's Law Department would need to review the production to identify privileged documents.[153] OIG Counsel Colin Carriere replied that it was unacceptable for Babcock & Brown to permit the Law Department to review the documents to be produced,[154] but later the same day, General Counsel Acheson wrote to O'Melveny & Myers reaffirming her demand that certain documents be sent to her office for review, stating that Babcock & Brown could produce to OIG documents responsive to its request but must first provide to her office "any responsive documents you identify that are likely to be privileged and confidential." Acheson asserted that a privilege potentially attached to some of the documents because Babcock & Brown was retained through Amtrak's counsel, Vedder Price.[155] Acheson further stated that her office would neither "withhold nor redact a single document or item of text but will simply mark those that contain confidential and/or privileged material."[156] On February 20, 2009, O'Melveny & Myers produced to the OIG documents responsive to the subpoena following the Law Department review.[157]

As indicated above, the OIG also requested documents from the CFO, who was represented by Patton Boggs LLP. In an e-mail exchange between OIG and Patton Boggs in mid-January 2009, Patton Boggs declined to produce documents to OIG without first providing

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[151] Sept. 9, 2008 e-mail from Fred Weiderhold to Steve Patterson.

[152] OIG Subpoena No. 08-47 (Dec. 29, 2008).

[153] Feb. 11, 2009 Letter from O'Melveny & Myers LLP to OIG.

[154] Feb. 13, 2009 Letter from OIG to O'Melveny & Myers LLP.

[155] Feb. 13, 2009 Letter from Law Dep't to O'Melveny & Myers LLP.

[156] *Id.*

[157] Feb. 20, 2009 Letter from O'Melveny & Myers LLP to OIG.

copies to the Amtrak Law Department for a privilege review.[158] The documents eventually were provided to OIG after Law Department review.[159]

Similarly, around January 2009, the OIG requested documents from, and an interview of, Amtrak's Treasurer. The Treasurer's counsel, Kobre & Kim LLP, notified the OIG that he could not produce two potentially privileged documents requested by the OIG without approval from William Herrmann of Amtrak's Law Department.[160] When the OIG suggested that, rather than send the documents to the Law Department to be marked as privileged, Kobre & Kim could simply mark the documents "Privileged/Confidential/Proprietary to Amtrak" and provide them directly to OIG, Kobre & Kim stated that it would await approval from Herrmann "or someone else in [the Treasurer's] chain of command."[161] After hearing nothing further, the OIG wrote Herrmann on March 26, 2009 to advise him of the OIG's January document request to the Treasurer and to notify him that the Treasurer's counsel was delaying production of two potentially privileged documents on grounds that they first must be reviewed by the Law Department.[162] Several days later, Herrmann replied that he had reviewed the requested documents and marked them as privileged, and that the OIG should expect to receive the documents from the Treasurer's counsel.[163] On March 31, 2009, the OIG received the documents from Kobre & Kim.[164]

3. *Moynihan Station Project Manager Investigation*

In March 2008, the OIG began an investigation of the Moynihan Station Redevelopment Project, including review of a Memorandum of Understanding ("MOU") between Amtrak and the developer, and the activities of the Moynihan Station Project Manager.[165] Specifically, the OIG sought information regarding the expenses incurred by the Project Manager, including an apartment lease in New York associated with her employment, and the use of lobbying firms and consultants in connection with the project.[166]

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[158] Jan. 21, 2009 e-mail from Patton Boggs LLP to OIG.

[159] Memorandum from OIG answering questions regarding Defeased Leases issue.

[160] Mar. 3, 2009 e-mail from Kobre & Kim LLP to OIG.

[161] Mar. 4, 2009 e-mail from Kobre & Kim LLP to OIG.

[162] Memorandum from OIG to Law Department on Defeased Loans Amount Requested (Mar. 26, 2009).

[163] Mar. 30, 2009 e-mail and memorandum from Law Department to OIG.

[164] Mar. 31, 2009 e-mail from Kobre & Kim LLP to OIG.

[165] Referral Memorandum from John Grimes to Alex Kummant (Oct. 24, 2008).

[166] *Id.* at 3-4.

In May and June of 2008, OIG Chief Inspector John Grimes contacted Anne Witt, Amtrak's Vice President of Strategic Partnership/Business Development and the Project Manager's supervisor, to obtain the MOU, lease, and documents relating to the Project Manager's employment.[167] On June 26, 2008, Witt agreed to send Grimes the MOU and the lease, but told him that she did not have copies of documents relating to the Project Manager's personnel action, suggesting instead that Grimes request them from the Board/Corporate Secretary's office.[168] On August 15, 2008, General Counsel Acheson called Grimes to inform him that she had the personnel documents he had requested.[169] On August 22, 2008, Grimes picked up the documents, which he identified as two Board meeting minutes, one of which had been redacted.[170]

4. Shoreline East Commuter Rail Service Audit Issue

In June 2008, the OIG conducted a review of a proposal between Amtrak and the Connecticut Department of Transportation ("ConnDOT") for Amtrak to provide weekend services on the Shoreline East Commuter Rail. In particular, the OIG sought to review whether the proposal violated certain statutes including, among others, the Northeast Rail Services Act, which prohibits Amtrak from subsidizing a commuter rail service.[171]

In connection with this investigation, OIG auditor Mark Scheffler requested a document entitled *Senior Staff Summary No. 36850,* which Amtrak's Strategic Partnerships Department had submitted to ConnDOT and which outlined the proposal and its costs.[172] Scheffler also requested several related documents. Scheffler was informed by Tom Moritz, Senior Director of Commuter Planning in the Strategic Partnerships Department that "[w]e have been asked by Law to allow them to review any documentation before forwarding to OIG."[173] Scheffler's efforts to obtain the information continued throughout July.[174] On August 4, 2008, the Strategic Partnerships Department forwarded several responsive e-mails to the OIG and

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[167] Memorandum from John Grimes to Phyllis Sciacca on Moynihan Station Project Manager Investigation Docs (May 5, 2009).

[168] June 26, 2008 e-mail from Anne Witt to John Grimes.

[169] Grimes memo, *supra* note 167.

[170] *Id.*

[171] Memorandum from Mark Scheffler to Phyllis Sciacca on Amtrak/OIG Investigation Information Request, at 1 (May 4, 2009).

[172] *Id.*

[173] July 2, 2008 e-mail from Amtrak Strategic Partnerships Department to OIG.

[174] July 15, 2008 e-mail from OIG to Amtrak Strategic Partnerships Department; July 25, 2008 e-mail from OIG to Amtrak Strategic Partnerships Department.

indicated that a senior associate general counsel had needed to review them before they were provided to the OIG.[175] The OIG's review ended after ConnDOT decided not to implement a weekend rail service.

5. Rail Sciences Investigation

In December 2007, the OIG opened an investigation into the billing practices of an Amtrak vendor called Rail Sciences Inc. ("RSI") after receiving information from a whistleblower claiming that RSI—which provides consulting services to Amtrak on issues such as derailment, track/train dynamics, operations planning and analysis, and testing and instrumentation—had overcharged Amtrak by billing for time during which no work was performed and by billing certain employees at inflated rates.[176] The whistleblower provided documents to substantiate the allegations.[177] RSI retained Decker, Hallman, Barber & Briggs ("Decker") to represent it in the investigation.[178]

In connection with the investigation, the OIG made a number of document requests to RSI[179] including a request for "[a]ll records maintained in the Time Matters, Time Slips and Image Time data bases or applications that refer to hours expended on Amtrak matters and any software required to read the data."[180] The OIG also asked to interview certain RSI employees. Although some information was produced to the OIG, Decker declined to produce information contained in certain databases. Decker informed the OIG that providing the OIG access to these databases would require RSI to breach its confidentiality agreements with other clients.[181]

In the meantime, the Law Department had learned of the investigation, and on March 31, 2008, General Counsel Acheson sent a letter to Decker and to the OIG requesting that RSI send to the Law Department copies of certain documents that had been produced, or would

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[175] Aug. 4, 2008 e-mail from Strategic Partnerships Department to OIG.

[176] Memorandum Regarding Response to Rail Sciences Issues provided by OIG (undated).

[177] *Id.*

[178] Weiderhold memo, *supra* note 1.

[179] Subpoena issued by OIG to RSI Custodian of Records (Dec. 14, 2007).

[180] Jan. 30, 2008 Letter from OIG to Decker at 3.

[181] Mar. 24, 2008 Letter from Decker to OIG at 1.

be produced, to OIG.[182] Acheson said the Law Department wanted to mark the documents for privilege or confidentiality and would then provide them to the OIG.[183]

Thereafter, RSI told the OIG that it would not provide any further information in response to the OIG's request regarding Amtrak without the General Counsel's express permission. Decker also indicated that it would not allow the OIG to interview any RSI employees unless someone from the Law Department was present.[184]

6. Rocla/SEPTA

In January 2008, OIG began an investigation of products that Amtrak purchased from Rocla Concrete Tie, Inc. ("Rocla"). Specifically, OIG sought to determine if Amtrak or Rocla should bear the cost of replacing certain defective concrete ties provided by Rocla.

OIG auditor Cheryl Chambers requested background information and supporting details from Amtrak's Deputy Chief Engineer David Staplin regarding inspections performed on concrete ties furnished by Rocla.[185] In response, Amtrak's Chief Engineer Frank Vacca called the OIG to say that the Engineering Department was meeting with the Law Department to discuss the concrete tie failures and to suggest that OIG attend the meetings going forward to gather information for the audit.[186] Subsequent messages to the Engineering Department resulted in a February 11, 2008 e-mail from the Engineering Department directing the OIG to "[p]lease contact Christine Lanzon [Associate General Counsel] in the Law Department and she will include you in the various activities surrounding the Rocla ties."[187] When the OIG contacted the Law Department to discuss the scope of the audit and request background information on the concrete tie failures, the Law Department expressed concern about releasing proprietary information to the OIG.[188]

On May 28, 2008, the OIG met with the Law Department to discuss Rocla issues.[189] At the end of the meeting, the Law Department said it would provide the OIG with

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[182] Mar. 31, 2008 Letter from Law Department to Decker and OIG at 1.

[183] *Id.* at 2.

[184] Apr. 14, 2008 Letter from Decker to OIG and Law Department at 2.

[185] Jan. 28, 2008 e-mail from OIG to Engineering Department.

[186] Memorandum from OIG providing information for Rocla Audit Write-Up at 1 (May 6, 2009).

[187] Feb. 11, 2009 e-mail from Engineering to OIG.

[188] Memorandum from Cheryl Chambers to Kathi Ranowsky on Rocla - Request for Information (Aug. 7, 2008).

[189] Memorandum from Thelca Constantin to Cheryl Chambers on Rocla Concrete Ties (May 29, 2008).

some documents relating to the Rocla contract, including notes from a presentation made to the Board in February 2008 and copies of the current contract and a current purchase order agreement. When the OIG inquired on June 5, 2008 as to when the Law Department would deliver the documents, the Law Department responded that it was still gathering documents.[190]

On June 10, 2008, the Law Department and the OIG discussed the review of documents that the Engineering Department had collected since May 29, 2008.[191] The Law Department sent an e-mail to Chambers the same day, confirming their conversation and writing, "under the [October 10, 2007] Protocol all materials provided to the IG's office should first be reviewed by the Law Department" so that the Law Department could ensure that the OIG received "everything you require but that privileged material is also protected."[192]

On June 17, 2008, the Law Department provided documents responsive to the OIG's June 5, 2008 request but the production was incomplete.[193] Specifically, the Law Department did not provide all of the requested inspection reports, and redacted some of the documents, including the minutes of an Amtrak Board of Director's meeting.[194] In addition, the production designated certain documents as "privileged, confidential, proprietary."[195] The documents so designated included Amtrak Board meeting minutes, purchase orders, contract amendments, and retention letters to outside law firms and engineers hired by the Law Department to review Rocla's "financial records."[196]

7. *OIG Reviews of ARRA Spending*

On March 13, 2009, after enactment of the American Recovery and Reinvestment Act of 2009 ("ARRA"), the OIG made a global and recurring request to Amtrak's CFO for all ARRA-related documents.[197] Amtrak's CFO is the designated point of contact for all ARRA

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[190] June 5, 2008 e-mail from Law Department to OIG.

[191] June 10, 2008 e-mail from Law Department to OIG.

[192] *Id.*

[193] June 17, 2008 Letter from Law Department to OIG; Weiderhold memo, *supra* note 1, at 6.

[194] Weiderhold memo, *supra* note 1.

[195] June 17, 2008 Letter from Law Departmennt to OIG.

[196] *Id.*

[197] Memorandum from Fred Weiderhold to DJ Stadtler on Recovery Act of 2009 at 1(Mar. 13, 2009); OIG memorandum of ARRA issues.

matters,[198] and the OIG sought information from the CFO in order to facilitate current and future OIG reviews of ARRA spending by Amtrak.[199]

At some point between March 13, 2009 and March 23, 2009, Amtrak's CFO and the Law Department agreed on a protocol whereby the OIG's document requests would be processed by the Law Department for a privilege review and Bates stamping.[200] The OIG did not agree to this protocol or participate in its formulation.[201] The Law Department was then copied on various transmittals of documents and information from the CFO to the OIG.[202] On May 19, 2009 the Law Department circulated a document preservation request to a broad range of Amtrak departments informing them of the OIG's role in overseeing ARRA spending, the departments' obligation to preserve relevant documents, and the Law Department's role in handling documents for production to the OIG.[203]

The Law Department has engaged a third party for the production review.[204] During the processing by that third party, electronic documents are converted into hard copy form for eventual production to the OIG.[205] This conversion results in loss of metadata associated with the electronic documents.[206] In addition, the Law Department is making its own determinations regarding responsiveness of ARRA-related e-mails sought by the OIG.[207] In May 2009, the Law Department asked the OIG whether the OIG will agree to narrow the search terms in its request.[208]

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[198] *Id.*

[199] *Id.*

[200] Mar. 23, 2009 e-mail from DJ Stadtler to Fred Weiderhold; OIG memorandum of ARRA issues.

[201] May 6, 2009 e-mail from K. Ranowsky to K. Elias.

[202] *See, e.g.* Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #1 (Mar. 30, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documenation #2 (Apr. 6, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #3 (Apr. 10, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #5 (Apr. 28, 2009).

[203] Memorandum from Eleanor Acheson to various Amtrak departments on Notice to Preserve Records - American Recovery and Reinvestment Act of 2009 (May 19, 2009).

[204] OIG memorandum of ARRA issues.

[205] *Id.*

[206] *Id.*

[207] *Id.*; *see also* May 11, 2009 e-mail from Law Department to OIG.

[208] May 11, 2009 e-mail from Law Department to OIG.

In addition, according to the OIG, the involvement of the Law Department and the use of a third party to create hard-copy documents creates unnecessary delays in the OIG's receipt of documents.[209] To partially address this issue, the Law Department has offered to permit the OIG access to the documents via the third party's website;[210] however, such access would be monitored by the third party.[211]

Beyond the ARRA-related request to Amtrak's CFO, the Law Department has directed all departments to notify it of all OIG requests for documents.[212] The Law Department has stated that the purpose of the notification is to permit the Law Department to review and mark potentially privileged documents before production to the OIG.[213]

8. Recent Investigation of Cyber Intrusion

The investigations and other incidents described above are the most significant examples of the implementation of the Protocol and 2007 EXEC-1 in current investigations. Similar examples of interaction between the Law Department and the OIG have occurred on a smaller scale from time to time, potentially adversely impacting the OIG's ability to fulfill its statutory mission and duties. One such episode involved the discovery that an Amtrak computer server had been compromised by an unknown outside intruder. The OIG opened an investigation into the matter. The Law Department was also investigating the cyber intrusion. At least one contract employee who had contact with the Law Department during the investigation was explicitly directed by the Law Department not to inform or discuss the matter with anyone from the OIG.

E. Issues Regarding the OIG's Personnel Authority

The Inspector General Act authorizes the IG "to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General . . . ."[214] To implement this provision, Amtrak's IG entered into an MOU in 1999 with Amtrak's Vice President for Human Resources ("HR") to govern the

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[209] May 6, 2009 e-mail from Law Department to OIG; OIG memorandum of ARRA issues.

[210] OIG memorandum of ARRA issues.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] 5 U.S.C. app. 3 § 8G(g)(2).

working relationship between the OIG and the HR Department with respect to OIG personnel.[215] The MOU was approved and signed by Amtrak's then Chairman.

The 1999 MOU recognizes the IG's "independent human resources and personnel authority as provided for under the Inspector General Act" and acknowledges that the IG "possesses all human resources and personnel authority related to recruiting and staffing."[216] It provides that "[t]he IG will serve as final authority for all OIG human resources and personnel matters . . . ," including determining "the classification, salary, and title for all IG personnel" (in consultation with HR).[217] In making such determinations, the 1999 MOU states that "the IG will use as guideposts information regarding other IG offices . . . ." It also states that "[t]he OIG shall make pay-related decisions, provided that such determinations may be accomplished within the budget of the OIG . . . ."[218]

Additionally, the IG's own salary has historically been set by Amtrak's Chairman, not the Board of Directors, pursuant to the Chairman's statutory role under the IG Act as the sole general supervisor of the IG.[219] However, the 2008 IG Reform Act established new and specific parameters and adjustments for the salary levels of DFE IGs.[220] It does not grant authority over IG salaries or adjustments to any other agency or DFE officials.

1. Salary Adjustments for the IG and OIG Staff

In 2008, the IG sought a personal salary adjustment pursuant to the provisions of the 2008 IG Reform Act. The HR Department and the Law Department worked together to bring a proposed adjustment—which the OIG argued was lower than that provided for in the IG Reform Act—before the Board of Directors.[221] Amtrak's Board ultimately approved an adjustment to the IG's salary that was in line with the OIG's original recommendation and the provisions of the Act.

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[215] Memorandum of Understanding Concerning Human Resources Authorities and Services Between Amtrak's Office of the Inspector General and Human Resources (June 1999) ("1999 MOU").

[216] *Id.* at 1.

[217] *Id.* at 1, 3.

[218] *Id.* at 2.

[219] *See* 1999 MOU at 1; 5 U.S.C. app. 3 § 8G(d).

[220] Pub. L. No. 110-409 § 4(b), *supra* note 30.

[221] *See* Memorandum from Bret Coulson to Donna McLean on Inspector General Salary Adjustment (Nov. 21, 2008).

The HR and Law Departments have similarly been involved in the IG's recent efforts to grant salary adjustments to OIG staff. As described above, the 1999 MOU reserves to the IG the authority to set compensation levels in accordance with statutory requirements.[222] The IG has routinely exercised independent authority over OIG staffing and compensation in the past.[223] Nevertheless, in connection with a recently proposed percentage salary adjustment for OIG staff, the HR and Law Departments insisted on obtaining Board of Directors approval for the adjustments.

In an e-mail to the OIG on the issue, Amtrak's General Counsel stated that the basis for the Law Department's involvement in this matter was a signing statement issued by President Bush on October 14, 2008 in connection with the enactment of the IG Reform Act.[224] The signing statement notes that section 6 of the Act gives "Inspectors General the right to obtain legal advice from lawyers working for an Inspector General."[225] It further notes that, although IGs may obtain legal advice from lawyers who work for them, "determinations of the law remain ultimately the responsibility of the chief legal officer and the head of the agency."[226] Relying on this statement, the General Counsel has maintained that she has "the exclusive authority and duty to construe law . . . including the IG Act" and had the authority to advise the HR Department regarding compensation levels for OIG staff.[227]

2. Attempts to Hire a New Chief Investigator

On November 26, 2008, the OIG sent a memorandum to the HR Department regarding the OIG's plans to hire a new Chief Investigator. The proposed candidate had more than 20 years' relevant experience and most recently had served as a postal inspector whose work was instrumental in obtaining guilty verdicts in a $500 million fraud case. The anticipated starting date for the new Chief Investigator was within two weeks of the date of the memorandum.

By late February 2009, the OIG had still been unable to hire the candidate because of the HR Department's objections to the proposed salary. The OIG intended to offer the candidate a salary comparable to the salaries of other federal OIG chief investigators and law enforcement officers. The HR Department maintained that the salary offer should be approximately $22,000 lower, which the HR Department determined using non-OIG salaries,

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[222] 1999 MOU § 2.

[223] *See* Jan. 15, 2009 e-mail from Donna McLean to Lorraine Green.

[224] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

[225] Signing Statement for H.R. 928, Inspector General Reform Act of 2008 (Oct. 14, 2008).

[226] *Id.*

[227] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

such as the salaries for private sector security guards. In the OIG's view, these salaries should not have been considered in the calculation. In response, the HR Department proposed that Amtrak's Board of Directors decide the compensation level for the position.

On February 25, 2009, after a delay of almost three months, the OIG was informed that the HR Department would process the position as requested. As a result, the offer was made, the candidate accepted the position, and the parties agreed to a start date of March 9, 2009. Notwithstanding the agreement between the parties, the HR Department notified the OIG on March 6, 2009 that it had contacted the individual and rescinded the employment offer on behalf of Amtrak. Upon inquiry, the OIG was told that Amtrak's President had directed the HR Department to rescind the offer. The OIG subsequently received a memorandum from Amtrak Chairman Thomas Carper approving the new position but directing the OIG and the HR Department to rescind the agreement and to post (*i.e.*, advertise) the position.

F. Internal Procedures Governing ARRA Funds

A provision in Title XII of ARRA allocated $1.3 billion for Amtrak, primarily in the form of "capital grants" (in contrast to an operating subsidy). The measure expressly earmarked $5 million of that allocation to the Amtrak OIG. Specifically, the provision states:

> *Provided further*, That of the funding provided under this heading, $5,000,000 shall be made available for the Amtrak Office of Inspector General and made available through September 30, 2013.

Technically, none of these funds were appropriated directly to Amtrak. Rather, Congress directed that the ARRA funds be awarded in the form of grants made by the Secretary of Transportation through a process established in the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. No. 110-432) ("PRIIA"). Therefore, ARRA required Amtrak to apply to the Department of Transportation ("DOT") for the money. The OIG's ARRA funding is not exempt from this application process.

Amtrak submitted its grant application to DOT without the OIG's input, and the funds—including the OIG's earmark—have been deposited in Amtrak's capital account. Subsequently, Amtrak management circulated an internal document that, in summary format (similar to a PowerPoint presentation), outlines the procedures to be followed in seeking funds for ARRA projects. This document indicates that a specific project or use of ARRA funds must be approved by officials in the Procurement and Finance departments, as well as by the Chief Finance Officer ("CFO") and the Chief Operating Officer ("COO") and should also be reviewed (but not necessarily approved) by the Legal Department.

Around this time, according to a brief summary provided by the OIG, the IG had a discussion with the CFO about obtaining the OIG's ARRA funds. The IG objected to the approval process on the basis that it was inconsistent with the IG Act because both the approval procedures themselves and the officials whose approval is required are subject to OIG oversight. According to the OIG summary, the CFO responded by expressing "the opinion that all of the money provided under the economic stimulus package were Amtrak funds, including the amount allocated to OIG, and the funds will be accounted for using the procedures outlined."

Subsequently, Bret Coulson, Amtrak's Deputy IG for Management and Policy, had a similar discussion with Amtrak's Assistant Vice President for Financial Planning, who echoed the CFO's view: "[She] took the position that the money is given to Amtrak through an Amtrak Grant and that if OIG wants to make expenditures they had to request the funds from Amtrak." The OIG summary also indicates that Coulson initiated the process for hiring a new Assistant IG for Special Recovery Act Oversight and states that "Amtrak Corporate, when posting the position, set it up to require approvals" from several of the officials named in the ARRA funds approval process and Amtrak's President, as well as the officials normally involved in OIG hiring—the IG himself and the Human Resources Department.[228]

V. ANALYSIS UNDER THE IG ACT AND OTHER AUTHORITIES

This section examines the practices and policies discussed above to determine whether and to what extent they constitute impairments to the OIG's actual or perceived independence under the standards of the IG Act.

In sum, we conclude that Amtrak's current policies regarding OIG oversight constitute significant impairments to the Amtrak OIG's actual and perceived independence under the standards of the Inspector General Act and published OMB and GAO guidance. As discussed in Section III above, the IG Act gives each IG the authority and discretion to initiate and carry out audits, investigations, and inspections "as necessary" within the IG's judgment. The Act gives the IG direct access to entity information and vests the IG with independent authority over OIG staff and resources. The Act further provides that the IG shall report only to the agency or DFE head and contains no provision allowing the DFE head to delegate his or her general supervisory authority to any other entity official. In fact, the Act mandates expressly to the contrary: that the IG "shall *not* report to, or be subject to supervision by, any other officer or employee." (Emphasis added.) In addition, the Act creates a direct reporting relationship with Congress, requiring that reports be transmitted to Congress through the DFE head *only* for the purpose of allowing the DFE head to comment on the content of such reports.

Similarly, OMB's 1992 *Guidance* charges entity heads with ensuring that DFE officers and employees understand the IG's authorities and the need to "expeditiously" assist the IG in support of those authorities. Further, OMB prohibits entity heads from delegating OIG budget decisions to others and expresses a clear preference, since reflected in amendments to the Act, that IGs obtain legal advice and assistance from their own counsel, and not from the entity's or agency's Office of General Counsel. In the same vein, the GAO has strongly urged IGs to be free of "external influences or pressures" from others within the agency or DFE, commenting that auditors, such as IGs, "must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments to independence."

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[228] OIG summary regarding ARRA funding issues.

Evaluated against these principles, it is clear that each of the Protocol and 2007 EXEC-1, Amtrak's policies regarding OIG personnel authority, and Amtrak's internal procedures governing the OIG's use of ARRA funds constitute significant impairments to OIG independence because they improperly restrict the OIG's access to information, subject the OIG to oversight by the Law Department and other departments within Amtrak, and cast doubt on the objectivity of the OIG's work because of the fact and appearance of external political pressures on the OIG. We discuss these conclusions in more detail below.

A. The Policy and Practices Reflected in the Protocol and 2007 EXEC-1 Violate Prevailing Standards of IG Independence

Under the Law Department Protocol, the OIG may not disclose Amtrak information to any third party, except (1) in response to a request, referral, or discussion with DOJ, or (2) as required by law, but only with prior notification to the Law Department. Under the 2007 EXEC-1, the OIG is required, among other things, to inform the Law Department before disclosing to any third party any information obtained or developed in the performance of the OIG's duties that is "confidential, classified, proprietary, or privileged," except as required by law. It also requires the OIG to notify the head of each department from whose employees the OIG expects to identify, review, or collect information in connection with a review, audit, inspection, or investigation—before the OIG begins it work—except where notification would be "inappropriate," and, when "appropriate," to keep department heads and managers informed of "the purpose, nature and content of OIG activities concerning their respective programs or operations."

The Protocol and 2007 EXEC-1 each contravene multiple provisions of the IG Act. First, both the Protocol and the EXEC-1 prohibit the OIG from disclosing any "Amtrak information" to Congress until *after* review by the Law Department and an opportunity by the Law Department to take appropriate action "to restrict or limit disclosure of such information." Even then, disclosure of Amtrak information to Congress is permissible under these policies only if *required* by law. This limitation would presumably prohibit any reporting of Amtrak information to Congress other than in a semiannual report or seven-day letter, including any of the informal reporting mechanisms discussed above in section III.B. The Protocol and 2007 EXEC-1 are accordingly inconsistent with the letter and spirit of Congress's intention to create a direct reporting relationship between the IGs and Congress. They also contravene the clear requirements of the Act that IG reports to Congress—whether semiannual reports or seven-day letters—be provided in advance only to the DFE head, and even then only for purposes of review and comment; the DFE head may not intercept, change, or reject such reports and, *a fortiori*, clearly is not empowered to delegate any such authority to the entity general counsel.[229]

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[229] *See* 5 U.S.C. app. 3 § 5 (requiring IGs to make both regular semiannual reports to Congress on the OIG's activities and immediate reports regarding "particularly serious or flagrant problems" in the agency or DFE; both kinds of reports are conveyed first to the entity head who must then transmit them to Congress without change (but with comments, as appropriate) within specified time frames).

Second, the Protocol prohibits the OIG from sharing Amtrak information with third-party consultants such as John Toothman. As detailed above, the Protocol allows the OIG to disclose Amtrak information only to DOJ or "as required by law." Neither circumstance would empower OIG to share information with a third-party consultant. As a practical matter, therefore, the Protocol is inconsistent with section 8G of the Act, which authorizes an IG to, among other things, "obtain the temporary or intermittent services of experts or consultants . . . ."

Third, the Protocol and EXEC-1 create reporting requirements in contravention of the Act. In order to protect the IG's independence, section 8G(d) of the Act provides that a DFE IG "shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to or be subject to supervision by, any other officer or employee of such designated Federal entity." Congress specifically vested supervisory authority over an IG in only the DFE head so that an IG would not be "severely handicapped" by the conflicts of interest or internal political pressures that would inevitably arise if an IG were under the direction of other agency or DFE officials whose programs or conduct would be subject to the IG's oversight.[230] The Protocol and 2007 EXEC-1 plainly violate the spirit of section 8G by requiring, in effect, that the OIG report to and be supervised by the Law Department in the context of the OIG's use of Amtrak information. Section 8G of the Act is also violated more generally by EXEC-1's requirement that the OIG notify department heads of OIG activities affecting their departments.

The reporting requirements of the Protocol and EXEC-1 also violate the spirit, if not the letter, of section 6 of the Act. Section 6 gives each IG the discretion to undertake investigations and reports "as are, in the judgment of the Inspector General, necessary or desirable." To require the OIG to notify department heads of impending audits or investigations and keep them informed of their "purpose, nature, and content" significantly impairs the IG's ability to exercise that statutory discretion. In some situations, it may be completely inadvisable for the IG to discuss an investigation with the head of the department that is the subject of the investigation. Although the 2007 EXEC-1 *seems* to acknowledge the IG's discretion to give or withhold information from department heads "when appropriate," this is a meaningless protection. Incorporating these requirements in EXEC-1 in the first place creates a presumption that the IG should be informing others of his activities, effectively placing the burden on the IG to justify instances where information is not shared. More practically, such a presumption will lead to arguments over whether the IG's decision to withhold information in a specific instance is "appropriate" and thus delay the progress of time-sensitive investigations.

Fourth, the Protocol and EXEC-1 have been implemented at Amtrak in ways that violate the IG Act. Practices such as the Law Department's pre-screening of all OIG-requested or subpoenaed documents, its correspondence with third parties instructing them on how to respond to the OIG, or—as occurred in connection with an investigation of the cyber intrusion discussed above in Section IV—instructions by the Law Department to Amtrak contractors not

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[230] *See, e.g.*, H.R. Rep. No. 100-1027, *supra* note 11, at 4.

to provide information to the OIG, each contravene the OIG's explicit authority of *direct* access to Amtrak's documents and information. Section 6 of the Act authorizes the IG to "have access to all records, reports, audits, reviews, documents, papers, recommendations or other material" that relate to the OIG's responsibilities. The language of section 6 does not in any way qualify or restrict the IG's access to information, nor does it subject such access to the approval of any other agency or DFE official. In fact, section 6 expressly contemplates that the IG report only to the entity head when, in the IG's judgment, any requested information is "unreasonably refused or not provided." The legislative history of the Act makes plain that Congress deliberately incorporated these authorities into the Act after an exhaustive examination of numerous instances of federal agency roadblocks to audits and investigations.[231] Amtrak's policies allowing the Law Department to pre-screen documents produced to the OIG, attend OIG witness interviews, and block information to the OIG have re-created the very types of roadblocks Congress intended the IG Act to eliminate.[232]

The Law Department has defended its role as necessary to protect legal privilege and other interests of the corporation. This is an important consideration. But under well established case law, OIG agents are "representatives" of their respective agencies or entities,[233] and documents transferred to an OIG in connection with an audit or investigation remain privileged, proprietary, confidential, and classified.[234]

Indeed, the Law Department acknowledged as much in a June 19, 2007 letter by its counsel at Fried Frank to the OIG:

> [O]n May 2, 2007, I met with representatives from the OIG and—at the request of your staff—the Department of Justice . . . . I repeated at that meeting what the General Counsel had previously advised you—that there is no dispute about the OIG's right to the

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[231] Statement of Sen. Eagleton, *supra* note 14; statement of Rep. Fountain, *supra* note 12.

[232] The Protocol and 2007 EXEC-1 also ignore GAO's standards for an IG's organizational independence by establishing restrictions on access to records or individuals needed to conduct an audit or investigation. GAO has expressly characterized such practices as "impairments" to an IG's independence." *Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60, at 2.

[233] *See NASA v. FLRA*, 527 U.S. 229 (1999); *DOJ v. FLRA*, 266 F.3d 1228 (D.C. Cir. 2001); *see also* 5 U.S.C. app. 3 § 8G(d) (Amtrak's Inspector General "report[s] to and [is] under the general supervision of" the head of Amtrak).

[234] *See, e.g., Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270 (11th Cir. 2004) (prohibiting a law firm from obtaining audit materials from the OIG); *Hamilton Secs. Group Inc. v. HUD*, 106 F. Supp. 2d 23 (D.D.C. 2000) (refusing to allow an outside company to obtain information relating to an audit by an OIG); *United States ex rel., Martin Locey v. Drew Med., Inc.*, Case No. 6:06-cv-564-Orl-35KRS, 2009 U.S. Dist. LEXIS 5586 (M.D. Fla. Jan. 12, 2009) (finding that a document remained protected by the attorney-client privilege despite a subsequent transfer to an OIG law enforcement officer).

information it is seeking, even though much of it is protected by the attorney-client privilege and work product doctrine.[235]

Moreover, the OIG has the same ability as the Law Department to protect Amtrak information when necessary. The OIG and its legal staff can determine whether and to what extent Amtrak information is privileged, proprietary, confidential, or classified, and mark and protect that information as warranted, mindful of the risks of potentially waiving privileges and disclosing confidences.

The Law Department's approach—which involves designation by the Law Department of privileged and confidential documents before they ever reach the OIG—is contrary to the IG Act and not workable for numerous reasons. First, the very process of reviewing documents (even for the simple task of a privilege review) notifies the Law Department of an OIG investigation and permits the Law Department to actively monitor it. This is unacceptable under the IG Act and particularly problematic in cases where the Law Department's own wrongdoing or negligence may be in issue. Second, the process has on occasion led the Law Department to stray from its stated purpose of performing a privilege and confidentiality review into performing a *responsiveness* review; in such cases the Law Department impermissibly restricts information to be reviewed by the OIG. Third, the process significantly delays the production of documents to the OIG. Fourth, the process sometimes results in documents being redacted or withheld from the OIG, even though there is no waiver of privilege or confidentiality posed by sharing the documents with the OIG. Fifth, the Law Department can purport to limit OIG's use of documents collected from Amtrak departments, employees, and vendors through overbroad privilege and confidentiality designations.

The Law Department's separate attempt to limit the disclosure of potentially privileged and confidential information by the OIG to non-Amtrak parties is also problematic. As during the gathering stage, it is not appropriate for OIG to notify the Law Department of the existence, progress, or findings of its investigations, especially in cases where the Law Department's own wrongdoing or negligence may be at issue. For interviews with non-Amtrak personnel, it would not be appropriate or realistic for OIG to consult with the Law Department in advance of every such interview in order to satisfy the Law Department of its stated concerns regarding privileged and confidential information. Instead, the IG Act, by making the OIG responsible only to Amtrak's Chairman,[236] affords the OIG discretion in conducting its investigations without input or interference from the Law Department. The same holds for disclosure of OIG findings to third parties. The OIG in consultation with the Chairman can make its own determinations regarding such disclosures that may contain Amtrak's privileged and confidential information, mindful that there is no absolute prohibition against the OIG's

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[235] June 19, 2007 Letter from Fried Frank LLP to OIG.

[236] 5 U.S.C. app. 3 § 8G(d).

disclosure of privileged and confidential information.[237] A policy that presumptively empowers the Law Department and not the OIG to make such determinations is improper.[238]

B. The Extent of Involvement of the Law and HR Departments in OIG Personnel Matters Impairs the OIG's Independent Personnel Authority

The procedures lately followed at Amtrak with respect to the IG's salary adjustment run counter to IG Act section 8G(d)'s requirement that the IG be subject only to the "general supervision of the head of the designated Federal entity." As already stated, the head of Amtrak for purposes of the Act is the Chairman of the Board, not the President or Board of Directors. The purpose of section 8G(d) is to emphasize and reinforce the unique role Congress intended for the IG and to preserve the IG's independence from political pressure exerted by others in an organization who might seek to influence the OIG by manipulating its personnel resources and staffing decisions. In implementing the salary adjustment required under section 4 of the 2008 IG Reform Act, IG Weiderhold's salary should have been immediately adjusted and should only have been subject to the approval of the Chairman, not the Board.

Similarly, the circumstances surrounding the OIG staff salary adjustments and the proposed hiring of a new Chief Investigator contravened the OIG's independent personnel authority as protected by section 6(a)(7) of the IG Act. This provision clearly states that an IG "is authorized to select, appoint, and employ such officers as may be necessary for carrying out the functions, powers, and duties" of the OIG. Decisions regarding salaries, including raises for particular employees, are also within the discretion of the IG as matters intrinsic to "selecting, appointing, and employing" the OIG staff. The IG's personnel authority is one of several safeguards established by Congress to protect the Amtrak OIG's independence and objectivity. Amtrak's procedures also ran afoul of GAO's standards for OIG independence. GAO unambiguously regards external interference in the assignment, appointment, compensation, or promotion of audit personnel and restrictions on funds or other resources that adversely affect the ability of an audit organization (or an OIG) to carry out its responsibilities as impairments to auditor (or IG) independence.[239]

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[237] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Federal Offices of Inspector General* at 7 (Oct. 2003) ("In some instances, legal or professional obligations may require an OIG to disclose [privileged, confidential, or classified] information it has received.").

[238] In analogous circumstances the Project on Government Oversight advises that attorneys for the inspector general, and not attorneys for the agency, should advise on redactions to reports that may be necessary for Freedom of Information Act purposes; the organization recognizes that "General Counsels ... have the power to undermine IG investigations through decisions such as ... redactions from IG reports." Project on Gov't Oversight, *Inspectors General: Many Lack Essential Tools for Independence* at 3, 21 (Feb..26, 2008) *available at* http://www.pogo.org/pogo-files/reports/government-oversight/inspectors-general-many-lack-essential-tools-for-independence/go-ig-20080226.html.

[239] *Inspectors General: Proposals to Strengthen Independence and Accountability, supra* note 60, at 2.

The way in which these personnel matters were handled also violated the terms of the 1999 MOU, which recognizes the IG's personnel authority and limits the involvement of Amtrak officials in OIG personnel matters, including OIG salaries, and provides no role for the Board of Directors in these matters.[240] The OIG salary adjustments and choice of candidate for the position of Chief Investigator were therefore fully within the IG's authority should have been implemented as the IG proposed.

Moreover, the General Counsel's assertion of authority over OIG personnel decisions based on the presidential signing statement that accompanied the 2008 IG Reform Act is misplaced. The role of a presidential signing statement in interpreting the meaning of a statute is unclear and controversial. Federal courts have rarely used signing statements to aid their interpretations of the law.[241] They may be ambiguous and may contravene other statements in the legislative history. In fact, a bipartisan group of key Senate sponsors of the 2008 Act disputed the interpretation made by the President in his signing statement. The Senators (including the Chairman and ranking member of the Senate Homeland Security and Governmental Affairs Committee, which authored the legislation) explained that section 6 of the Act, which authorized the new position of Counsel for each IG, "did not address the authority of the general counsel within an agency," and "if an IG ultimately disagrees with a legal interpretation of agency counsel, then that IG should be free to record this disagreement, and their position on the matter, in their reports and recommendations to the head of the agency and to Congress."[242] In other words, the Act did not give general counsels any new authority, nor any supervisory authority over IGs, let alone, as the Amtrak General Counsel put it, "the exclusive authority and duty to construe law . . . including the IG Act."[243]

C. Amtrak's ARRA Funding Procedures Violate Standards of IG Budgetary Independence

The procedures put in place at Amtrak regarding Congress's $5 million earmark in ARRA funds for the OIG also run afoul of the letter and spirit of the IG Act. According to GAO's *Principles of Federal Appropriations Law*, an earmark is "the portion of a lump-sum appropriation [that is] designated for a particular purpose" and is a device "Congress uses when

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[240] In that respect, the 1999 MOU is similar to the Judicial Compensation Clause in Article III of the Constitution, which prevents the compensation of federal judges from being "diminished during their Continuance in Office." *Compare* Const. art. I, § 3 *with* 1999 MOU.

[241] GAO Report, *Presidential Signing Statements: Agency Implementation of Selected Provisions of Law*, GAO-08-553T, at 9 (Mar. 11, 2008).

[242] Press Release, Sen. Finance Comm., Senators Protest Presidential Signing Statement on Inspector General Reform Act, *available at* http://finance.senate.gov/sitepages/grassley2008.htm (Oct. 30, 2008).

[243] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

it wants to restrict an agency's spending flexibility."[244] More importantly, 31 U.S.C. § 1301(a) provides that "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." In addition, under general principles of statutory interpretation, the use of the word "shall" (as in, "shall be made available for [the Amtrak OIG]") can be interpreted only as a "command."[245] This view has been codified in several sections of the U.S. Code setting forth rules of statutory construction, which state that "'shall' is used in an imperative sense."[246] In view of these factors, it is clear that Amtrak may not use the $5 million earmarked for the OIG for any other purpose.

Because ARRA does not appropriate funds "to" the OIG, but "for" the OIG, and because ARRA does not exempt the OIG from PRIIA's grant process, it appears that the OIG is required to apply to DOT for the ARRA funds. This procedure does not infringe on the OIG's independence. However, Amtrak's multi-layered approval process for the OIG's ARRA earmark improperly impairs the OIG's independence.

As noted elsewhere, the IG Act protects the Amtrak IG's independence by limiting general supervision of the OIG to the Chairman and by prohibiting supervision of the OIG by any other officer or employee. In addition, section 6 of the IG Act requires the agency or DFE head, but not any other official, to provide the OIG with the resources "necessary" to the OIG's operations. Amtrak's ARRA funding approval process, which requires that any OIG expenditure of ARRA funds be approved by officials in the Procurement and Finance departments, as well as by the CFO and COO, is clearly inconsistent with these provisions of the IG Act.

Amtrak's procedures are also inconsistent with OMB's *Guidance*, which provides that entity heads cannot delegate budget decisions regarding the OIG to officers or employees subordinate to the entity head.[247] The Amtrak approval process is also an example of the agency encroachments on IG independence cited as problematic by GAO because such a process puts decision-making regarding the IG's ARRA funds into the hands of officials who may be competing with the IG for these funds.[248]

Amtrak should have followed its existing OIG budget process in handling the OIG's request for ARRA funds. Under existing procedures pursuant to section 8 of PRIIA, the OIG normally submits its budget request to Amtrak's Chairman, who transmits the request,

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[244] U.S. Gov't Accountability Office, Principles of Federal Appropriations Law, 3d ed., Vol. II, at 6-9, 6-26 (Feb. 2006).

[245] Tobias A. Dorsey, *Legislative Drafter's Deskbook* §6.55 (2006).

[246] *Id.*

[247] OMB *Guidance*, *supra* note 79.

[248] *See, e.g., Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60.

along with any comments, to the Administration and Congress. This process was followed as recently as February 2009, when Amtrak President Boardman transmitted Amtrak's budget request to Congress and the transmittal incorporated the OIG's separate budget request.[249] A similar process for obtaining ARRA funds—whereby Amtrak's Chairman would have transmitted the OIG's request for its earmarked funds to DOT unchanged, along with Amtrak's general ARRA funds request—would have been consistent with the IG Act, PRIIA, and the OMB *Guidance* and should have been used. Such a procedure would have recognized the special congressional earmark for the OIG in ARRA but bypassed the intermediate levels of approval that Amtrak has set up for ARRA funding for other departments and that violate the IG Act.

VI. RECOMMENDATIONS

In light of the foregoing issues and analysis, we provide below certain recommendations necessary for the Chairman of Amtrak to reestablish the OIG's independence and Amtrak's compliance with the IG Act.

A. The OIG Should Be Empowered To Collect Documents and Information Without Notification to or Involvement of the Law Department or Other Departments

The cornerstone of the inspector general function is independence from other departments within the organization.[250] In turn, an essential component of an inspector general's independence is unfettered access to documents and information.[251] In addition, because many inspector general investigations involve suspected wrongdoing within the subject organization, it is especially important to limit to the greatest extent possible the number of personnel aware of and involved in such investigations. Failure to keep OIG activities discreet could lead to spoliation of evidence and improper collaboration among witnesses, thereby compromising the effectiveness and integrity of OIG investigations.

As described above, Amtrak's current policies have frustrated the goals of unfettered access by the OIG to documents and information and maintaining strict confidentiality of OIG investigations by demanding that all Amtrak departments, employees,

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[249] Feb. 17, 2009 Letter of President Boardman to the Vice President of the United States and the Speaker of the House of Representatives at 13.

[250] *Inspectors General: Independent Oversight of Financial Regulatory Agencies*, supra note 88, at 5; *Inspectors General: Many Lack Essential Tools for Independence*, *supra* note 238, at 16, 30; *Quality Standards for Federal Offices of Inspector General*, *supra* note 237, at 6; *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 4.

[251] 5 U.S.C. app. 3 § 6(a)(1); *see also Inspectors General: Independent Oversight of Financial Regulatory Agencies*, *supra* note 88, at 6; Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Investigations* at 6 (Dec. 2003).

and vendors notify the Law Department of document requests from the OIG. Law Department actions in pre-screening documents (sometimes with the assistance of outside vendors) and, in some cases, withholding or redacting documents before production to the OIG are wholly improper, given that the IG Act gives the OIG direct access to Amtrak information and documents and requires the OIG to report to the Chairman and no other officer.[252] Moreover, as with the investigation of Amtrak's outside counsel relationships, the OIG is sometimes required to investigate possible wrongdoing or negligence by the Law Department itself. In such circumstances, the Law Department's involvement in OIG investigations is even more patently inappropriate.

The process of using the Law Department as a liaison between the OIG and Amtrak departments, employees, and vendors is not only troublesome from the perspective of OIG independence and the integrity of its investigations, but is also unnecessary, time consuming, and wasteful of Amtrak resources. There is no reason why Amtrak departments, employees, and vendors cannot directly submit documents and information to the OIG, without the attendant expense and delay caused by submitting such materials first to the Law Department.

For those reasons, the OIG should be empowered to gather documents and information in support of its investigations from Amtrak departments, employees, or vendors without any involvement of, or notification to, the Law Department or other departments. In addition, because Amtrak departments and employees in recent years have become conditioned to notify the Law Department of all OIG document and information requests, the Board of Directors should issue an Amtrak-wide directive announcing that this practice is no longer to be followed and reaffirming the OIG's right to unfettered access to documents and witnesses.

B. The Law Department Should Not Be Present for OIG Interviews with Amtrak Employees or Employees of Vendors

In several instances discussed above, Amtrak employees and even vendors' employees have sought to have Law Department attorneys (or outside counsel retained by the Law Department) present at OIG interviews. This practice is patently improper. In fact, the Office of Legal Counsel of the Department of Justice has provided analogous guidance that a federal agency may not indemnify an employee for legal representation in connection with an inspector general investigation of possible wrongful conduct.[253]

Because the interests of Amtrak and the interests of an employee under investigation will often be incompatible, serious conflicts can arise when Law Department attorneys or outside counsel purport to simultaneously represent Amtrak and Amtrak employees suspected of wrongdoing. The practice is also impermissible for the same reasons as stated

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[252] 5 U.S.C. app. 3 § 8G(d).

[253] 4B U.S. Op. Off. Legal Counsel 693 (1980).

directly above; it is contrary to the IG Act, disruptive, and wasteful to permit the Law Department to monitor and actively participate in OIG investigations in any manner, and especially during witness interviews. It may have, or be perceived as having, a chilling effect on a witness's candid cooperation. Accordingly, the routine participation of Law Department staff or outside counsel retained by Amtrak during OIG interviews should be stopped.[254]

C. The OIG Should Use Its Own Attorneys—Not the Law Department—To Advise on Issues Relating to Privileged and Proprietary Information

One of the principal stated reasons for the Law Department's attempts to position itself between the OIG and Amtrak departments, employees, and vendors is the Law Department's concern for protecting Amtrak's privileged and confidential information. Although this is an important consideration, it is does not require the Law Department to supervise OIG activities. As the Project on Government Oversight observed, "an agency general counsel's role is to protect the agency, which is at odds with the IG's role," and "in no case should an IG be allowed or required to use the agency's general counsel for legal advice."[255]

The OIG itself is capable of identifying privileged and confidential information that it collects in the course of investigations. The OIG can similarly determine how to utilize such privileged and confidential information in the course of witness interviews and further information gathering, mindful of the risks of potentially waiving privileges and disclosing confidences. Amtrak's policies and procedures should reflect that the OIG's attorneys, not the Law Department, are empowered to make these determinations in the context of OIG activities.

D. The OIG Should Be Permitted To Utilize ARRA Funding Allocated by Congress, and To Set Compensation for Its Staff, Without Involvement of other Amtrak Departments

Finally, the OIG's effectiveness is also threatened by interference in the OIG's budget and personnel decisions. Budget and staff determinations are an important aspect of the OIG's independence.[256] Indeed, pursuant to the IG Act's requirement that an inspector general be subject to the "general supervision" (rather than day-to-day supervision) of the agency head,

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[254] This is not to say that Amtrak employees or Amtrak's vendor's employees must be prohibited from having individual counsel present at OIG interviews; only that such attorneys cannot be Law Department staff or paid for by Amtrak, except under certain limited circumstances. Moreover, the IG, in his sole discretion, may invite participation of Law Department attorneys where he deems it appropriate.

[255] *Inspectors General: Many Lack Essential Tools for Independence*, *supra* note 238, at 3, 32.

[256] *Id.* at 18-21.

even an agency head is limited in the measures it may take to limit an inspector general's spending.[257]

Whatever the proper role of an *agency head* in decisions affecting an inspector general's budget, this much is clear: no other department, *including the Law Department*, has any authority whatsoever to oversee or influence how the OIG utilizes funds specifically allocated to the OIG by Congress; nor do the Law or HR Departments have authority to dictate the terms of OIG staff compensation. To the contrary, these intrusions by the Law Department are in contravention of the IG Act, which gives the OIG considerable discretion to "select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof . . . ."[258] Nowhere does the statute give an agency general counsel any input as to such matters. Moreover, any such attempt to limit the OIG's use of resources tends to make the OIG subordinate to the Law Department even though the statute provides that the OIG shall report only to Amtrak's Chairman and no other officer.[259] The mere suggestion of such subordination poses a threat to OIG independence and effectiveness.

Other commentary likewise makes clear that an inspector general should have freedom from other departments with respect to budgetary matters. For example, the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency reported that "interference in the assignment, appointment, or promotion of inspection personnel" and "restrictions on funds or other resources provided to the inspection organization" are impairments that deprive an inspector general of "complete freedom to make independent and objective judgment, which could adversely affect the work."[260] Both such impairments are squarely presented by the Law Department actions reviewed in this report. GAO also notes as problematic instances where entity officials competing with inspectors general for resources make budget decisions affecting the inspectors general.[261]

For these reasons, Amtrak's Board of Directors should make clear that no other Amtrak department may attempt to restrict or influence the OIG's budgetary or personnel decision-making.

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[257] *Id.* at 19 (discussing agency "micromanagement" of inspector general spending as a potential violation of the IG Act).

[258] 5 U.S.C. app. 3 § 8G(g)(2).

[259] *Id.* § 8G(d).

[260] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Inspections* at 6-7 (Jan. 2005); *see also Quality Standards for Investigations, supra* note 251, at 6.

[261] *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities, supra* note 44, at I.

E. Suggested Measures to Implement the Recommendations

1. Implement a New EXEC-1

As detailed above, the 2007 EXEC-1 contravenes multiple provisions of the IG Act. The OIG has drafted a new EXEC-1 (a copy of which is attached as **Exhibit D**), which should be implemented by the Chairman. In order better to provide the OIG with unfettered access to Amtrak's documents and information, to preserve the integrity of OIG investigations by limiting disclosure of matters under review, and to align Amtrak's OIG policies with those of the Department of Justice, this EXEC-1 includes the following provisions:

- A general requirement that Amtrak employees cooperate fully with any OIG request or investigation;
- A requirement that Amtrak employees give sworn statements to the OIG when requested;
- A requirement that Amtrak employees keep all information related to an OIG investigation strictly confidential (except as necessary to get legal advice from their own counsel). This confidentiality obligation would preclude disclosure to the Law Department or the employee's supervisors and would include questions asked and answers given, requests for documents and information, the subject of the inquiry, and even the very existence of the inquiry itself.
- A requirement that Amtrak employees notify OIG if another employee or other individual attempts to interfere with an OIG request or investigation;
- If asked, OIG will acknowledge that an Amtrak employee may have counsel or another representative present during an OIG interview; and
- A reminder that interviews should be scheduled directly between the OIG and the Amtrak employee, except that, in appropriate cases where the investigation will not be jeopardized and with the OIG's prior consent, the employee's supervisor may be consulted.

2. Issue a Directive from the Board of Directors to All Amtrak Employees and Departments

Because so many Amtrak departments and employees now operate under the requirement that OIG requests must be routed through the Law Department, a memorandum should be distributed along with the new EXEC-1 highlighting that this practice should not continue. The memorandum (a proposed copy of which is attached as **Exhibit E**) should include the following:

- A statement of the function and importance of the OIG;

- An instruction that OIG requests be answered promptly and without notification to or involvement of the Law Department;
- An instruction that OIG requests not in writing should be considered valid and enforceable;
- An instruction that OIG investigations and information requests are confidential and should not be reported to supervisors or others unless prior authorization is provided by OIG; and
- An assurance that the OIG will coordinate with the Chairman before the release of reports that may contain privileged or confidential information.

3. Rescind the Protocol

The October 10, 2007 Protocol is an agreement between the OIG and the Law Department to govern the use of privileged and confidential information by the OIG. The Protocol restricts the ability of the OIG to conduct investigations and make disclosures as may be required under the IG Act or requested by Congress. For example, paragraph 3 of the Protocol prohibits the OIG from disclosing Amtrak information to any third party (except the Department of Justice or as otherwise required by law, and only after prior notice to the Law Department). In the most literal sense, this provision would prohibit the OIG from gathering information (whether or not privileged or confidential) from one Amtrak vendor and then, without prior Law Department notification, asking questions of another Amtrak vendor using the information learned from the first. Paragraph 3 would also permit the Law Department to redact or limit disclosure of reports to third parties other than the Department of Justice, which means that the Law Department could impose such restrictions on OIG reports to Congress. Beyond those and other specific issues that may arise, the general difficulty with the Protocol is that the Law Department has no statutory basis to be involved in OIG investigations at any stage or for any reason. Thus, the Protocol should be rescinded.

4. Schedule Periodic Meetings between the Inspector General and Amtrak's Chairman To Monitor and Evaluate the Remedial Measures

It is important that the Inspector General and Chairman meet on a regular basis to discuss progress on implementing the recommendations above, and to discuss any concerns by either party regarding the efficacy and impact of the recommendations. In fact, the IG Act specifies that an inspector general shall have "direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act."[262] We recommend that such meetings occur in

[262] 5 U.S.C. app. 3 § 6(a)(6).

person, and at least once every 90 days until the Inspector General and Chairman conclude that the OIG's ability to function as envisioned by the statute has been restored.

5. Report to Congress

Finally, in light of the conclusions of this report that the OIG's ability to carry out its statutory functions has been compromised, we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

VII. CONCLUSION

The OIG performs an essential service, required by statute, in detecting and preventing waste, fraud, and abuse at Amtrak. In particular, the OIG in recent years has discovered and investigated instances of waste by Amtrak employees and vendors involving hundreds of millions of dollars.

In carrying out its statutory duties, the OIG must be independent from other Amtrak departments in fact and in appearance. This is a clear requirement of the IG Act, which specifies that the OIG reports only to Amtrak's Chairman and not to any other department or employee. Commentary related to the IG Act also makes abundantly plain that independence is critical to the inspector general function. Likewise, the IG Act makes clear that an inspector general must have unfettered access to agency documents and information.

The issues and analysis discussed above demonstrate that, contrary to the requirements of the IG Act, the OIG's independence at Amtrak has been diminished and threatened by recent policies and practices at Amtrak affecting OIG investigations and giving the appearance that OIG is subordinate to the Law Department. The involvement by the Law Department in OIG investigations both impermissibly and unnecessarily restricts the OIG's access to documents and information, and simultaneously permits the Law Department to become aware of, monitor, and, in some cases, actively restrict, OIG investigations. In addition, the OIG is facing unwarranted interference in its budget decision-making, both with respect to ARRA funds specifically designated by Congress to the OIG and the composition and compensation of OIG staff.

Amtrak can begin to restore its full compliance with the IG Act by implementing a modest number of corrective measures, principally by eliminating the role of the Law Department as a document and information clearinghouse for the OIG. Those and other recommendations discussed in this report will help reestablish the independence of the OIG and enhance its effectiveness and efficiency within Amtrak.